89-378

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1989

STATE OF ALABAMA, ex rel. DON SIEGELMAN,
ATTORNEY GENERAL, AND DON SIEGELMAN,
INDIVIDUALLY, AS A
CITIZEN OF THE STATE OF ALABAMA,
PETITIONERS,

V.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, AND LEE M. THOMAS,
ADMINISTRATOR OF THE ENVIRONMENTAL
PROTECTION AGENCY, AND CHEMICAL WASTE
MANAGEMENT, INC., AND STATE OF TEXAS,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ATTORNEY GENERAL
OF ALABAMA

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51 pp

QUESTIONS PRESENTED

I. Where the EPA denied to citizens of Alabama their Fifth Amendment guarantees of notice and an opportunity to participate in agency decision-making processes which adversely affect the citizens' economic and environmental resources, did the Eleventh Circuit Court of Appeals err in ruling that those citizens lacked standing to challenge the infringement of their constitutional rights?

II. Does the Eleventh Circuit Court of Appeals' interpretation of 42 U.S.C. 9613(h), which denies citizens who are not potentially responsible parties under CERCLA a forum within which to litigate legitimate statutory and constitutional claims, comport with the underlying purpose of the Act and the U.S. Constitution?

III. Did the Eleventh Circuit Court of Appeals err by dismissing as moot the issue relating to the requirement to post bond in this action?

Parties

The Caption contains the names of all parties to the proceedings in the court below except the following individuals:
Guy Hunt (Governor of the State of Alabama) and Leigh Pegues (Director of the Alabama Department of Environmental Management).

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OPINIONS BELOW[1]

1. The opinion of the United States District Court for the Middle District of Alabama, Northern Division, entering a Temporary Restraining Order in favor of the plaintiffs is reproduced as Appendix A to this petition.

2. The opinion of the United States District Court for the Middle District of Alabama, Northern Division, granting plaintiffs a preliminary injunction, is reproduced as Appendix B to this petition.

3. The opinion of the United States District Court for the Middle District of Alabama, Northern Division, granting plaintiffs partial summary judgment, is

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[1]The appendices to this petition are separately bound pursuant to Rule 21.1(k).

reproduced as Appendix C to this petition.

4. The opinion of the Eleventh Circuit Court of Appeals reversing the decisions of the United States District Court for the Middle District of Alabama, Northern Division, is reproduced as Appendix D to this petition.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals which is sought to be reviewed was rendered on April 18, 1989. The Appellate Court's order denying appellees/cross-appellants' timely petition for rehearing was denied on June 7, 1989. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment V (in pertinent part)

"...; nor shall [any person] be deprived of life, liberty, or property without due process of law;...."

STATEMENT OF THE CASE

A. Statement of the Facts

In 1983 the Texas Water Commission requested the Environmental Protection Agency (EPA) to include on its National Priorities List for cleanup, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §9601 et seq. (CERCLA), an abandoned petrochemical facility located near South Houston, Texas. The facility, known as the Geneva Industries site, was formerly a

refinery plant which, from 1967 through 1978, manufactured a variety of fuel oils and organic compounds, including biphenyls and polychlorinated biphenyls (PCBs). After a preliminary investigation, which revealed extensive PCB-contamination of on-site soils, the EPA placed the Geneva Industries site on its National Priorities List and thereafter commenced a Remedial Investigation and Feasibility Study (RI/FS) in order to evaluate the site and determine the appropriate remedial action. The remedial alternatives ultimately proposed by the EPA in its April 1986 RI/FS included on-site incineration, off-site incineration, and off-site landfill disposal of the PCB-contaminated soils.

On September 18, 1986, the EPA, Region VI, issued its Record of Decision (ROD) for the Geneva Industries site. The remedial action selected and memorialized by the EPA in its ROD was excavation and off-site landfill disposal of the contaminated soils rather than incineration. The EPA's decision to select excavation and off-site landfill disposal as the appropriate remedial action was based, in part, upon public opposition by local citizens to on-site incineration.

Although no off-site facility was identified in the ROD as the destination for the PCB-contaminated soils, the Texas Water Commission entered into a contract with Chemical Waste Management, Inc. (Chem Waste) on April 18, 1988, for the excavation and

transportation of the contaminated soils from the Geneva Industries site to the Chem Waste facility at Emelle, Alabama, for off-site landfill disposal.

At no time prior to or after the issuance of the ROD was the State of Alabama or any of its citizens, agents, or agencies including the Governor, Director of the Alabama Department of Environmental Management, or Attorney General contacted or consulted with regard to the off-site landfill disposal of PCB-contaminated soils from the Geneva Industries site.

Alabama officials first learned of the impending plan to excavate and transport the estimated 47,000 tons of PCB-contaminated soils from the Geneva Industries site to Emelle, Alabama, through media inquiries in June, 1988.

The State of Alabama subsequently petitioned the EPA to re-open its ROD in order to provide the State of Alabama and its citizens with notice and an opportunity to participate in the selection of a remedial action which would be appropriate for the Geneva Industries site and conducive to the health and safety of all parties involved. The EPA ultimately refused the State of Alabama's request that it reopen the ROD for the Geneva Industries site.

B. Proceedings Below

On September 28, 1988, the State of Alabama, ex rel. Don Siegelman, Attorney General, and three individual citizens of the State of Alabama, Guy Hunt (Governor of the State of Alabama),

Leigh Pegues (Director of the Alabama Department of Environmental Management), and Don Siegelman, filed a complaint against the United States Environmental Protection Agency and its Administrator in an effort to enjoin shipment of the PCB-contaminated soils from the Geneva Industries site to Emelle, Alabama. The lawsuit was instituted due to EPA's refusal to reopen the Geneva Industries site ROD and in order to secure to the individual plaintiffs therein their fifth amendment guarantees of notice and an opportunity to be heard under the Constitution of the United States. Federal jurisdiction was invoked pursuant to the provisions of the Fifth Amendment of the United States Constitution, 28 U.S.C. §§1331 (1980),

1332 (1988), 2201 (1948), 2202 (1988), 5 U.S.C. §§701-706 (1966), 42 U.S.C. §§9613 (1980) and 9659 (1986) of CERCLA as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), and the general equity jurisdiction of the Federal District Court. Subsequent to the filing of this lawsuit, the State of Texas and Chem Waste entered this action as intervenor-defendants.

On October 31, 1988, the United States District Court for the Middle District of Alabama, Northern Division, entered a preliminary injunction in favor of the plaintiffs which enjoined the EPA from

> "authorizing or engaging in (1) implementing the Geneva site Record of Decision [ROD] and taking any remedial action thereto; (2) funding by federal government monies, either through the use of Superfund or otherwise, such

remedial action; and (3) approving or otherwise facilitating the transportation of the Geneva Site contaminated soil from the State of Texas to the State of Alabama." (See Appendix B, p. 22a-23a).

In connection with the preliminary injunction, the District Court required the plaintiffs to post security in favor of the intervenor-defendants, neither of which were enjoined, in the amount of $564,970. The defendants and intervenor-defendants appealed the issuance of the preliminary injunction to the Eleventh Circuit Court of Appeals while the plaintiffs cross-appealed the District Court's requirement that the plaintiffs post bond.

During the pendency of these appeals, the United States District Court granted to plaintiffs partial

summary judgment, enjoining the implementation of EPA's remedial action for the Geneva Industries site until the EPA provided to plaintiffs an opportunity to comment on the remedial plan selected. The Eleventh Circuit Court of Appeals consolidated the appeals from the preliminary injunction with the appeals from the partial summary judgment.

On April 18, 1989, the Eleventh Circuit Court of Appeals reversed the District Court's grant of preliminary injunction and partial summary judgment, dissolving the preliminary injunction, and dismissing the case for lack of subject matter jurisdiction. The Court of Appeals also dismissed as moot the plaintiffs' challenge to the bond requirement which was imposed by

the District Court in connection with its grant of preliminary injunction.

On June 7, 1989, the Eleventh Circuit Court of Appeals denied appellees/cross-appellants' petition for rehearing and, in addition, issued its mandate. On July 10, 1989, the petitioners herein requested the Eleventh Circuit to recall the mandate pending petitioners' application to the United States Supreme Court for Writ of Certiorari. On July 25, 1989, the Eleventh Circuit denied petitioners' motion to recall the mandate.

INTRODUCTION

EPA's refusal to provide the State of Alabama and its citizens notice and an opportunity to participate in the decision-making process involving the selection of a remedy for the Geneva

Industries site forms the basis of petitioners' statutory and constitutional claims in this action. The petitioners advanced their due process claims in order to redress the harsh inequities inherent in EPA's refusal to involve, within its own administrative processes, the State of Alabama and its citizens -- the very parties who will ultimately bear the impact of EPA's action. The only remedy sought by the petitioners herein is a reopening of the ROD in order that they may be afforded an equal opportunity to submit additional evidence and differing viewpoints favoring the implementation of a permanent remedy appropriate for the treatment and disposal of the contaminated soils at the Geneva

Industries site. The petitioners seek nothing more than the same opportunity that was provided to the State of Texas and those citizens of the South Houston community who live in proximity to the Geneva Industries site.

Unless the petitioners prevail, it is clear that EPA will continue to engage in the illegal practice of excluding states and citizens targeted for the receipt of CERCLA wastes from participation in EPA's Superfund decision-making process. If allowed to persist, this scenario will discourage other states from developing hazardous waste landfill capacity within their own borders as required by CERCLA, 42 U.S.C. §9604 (1980) and will, unfortunately, rapidly encourage within these states the development of the

"NIMBY" (not in my back yard) syndrome.

As of the filing of this petition, the PCB-contaminated soils continue to move from the State of Texas into the State of Alabama. It is, therefore, imperative that this Court grant Certiorari, not only to redress the injuries sustained by the petitioners therefrom, but also to prevent recurrent violations of petitioners' constitutional and statutory rights.

REASONS FOR GRANTING THE WRIT

I.

This Court Should Grant Certiorari and Overturn the Ruling By the Eleventh Circuit Court of Appeals That Citizens of Alabama Lacked Standing to Challenge the Infringement of Their Constitutional Rights Where the EPA denied to Those Citizens Their Fifth Amendment Guarantees of Notice and an Opportunity to Participate in EPA Decision-Making Processes Which Adversely Affect those Citizens' Economic and Environmental Resources.[2]

It is the petitioner's position that the Eleventh Circuit Court of Appeals erred by denying to the individual plaintiffs the standing necessary to challenge EPA's failure to involve them in the development of

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[2]The constitutional claims herein are advanced on behalf of the individual petitioner, Don Siegelman.

EPA's ROD for the Geneva Industries site. In its opinion, the Court of Appeals incorrectly found that the individual plaintiffs to this action lacked standing based upon their status as taxpayers, State of Ala. v. U.S. E.P.A., Nos. 88-7677, 89-7024 at 2321-2322, (11th Cir. April 18, 1989), and that, as a consequence, plaintiffs failed to satisfy the minimum constitutional requirement of injury in fact necessary to meet the case and controversy mandate of Article III of the United States Constitution.

The Court of Appeals, however, misapprehended the nature of the constitutional claims advanced on behalf of the individual plaintiffs. As was previously emphasized in the appellees/cross appellants' brief to

the Court of Appeals, "This is not a taxpayers' suit." (Brief of Appellees/ Cross Appellants, pg. 19). The petitioner has, throughout the course of this action, never challenged the constitutionality of the expenditures of federal tax revenues under CERCLA. The petitioner has, however, affirmatively challenged EPA's use of such funds to implement a governmental action which deprives him of his property and liberty without due process of law.

The petitioner simply asserts that he and the other individual plaintiffs to this action possess a clearly definable and quantifiable property interest in the use and enjoyment of their state resources and further, that the actions undertaken by the defendants

have, without due process of law, deprived the petitioner of his utilization, enjoyment, and conservation of these resources. The affidavits of Margaret Corey, former Compliance Chief of the Alabama Department of Environmental Management's Hazardous Waste Branch, (Doc. Rec. No. 9) and Lieutenant Thomas E. Mesaris, Assistant Unit Commander of Alabama's Motor Carrier Safety Unit, (Doc. Rec. No. 10) irrefutably establish that the shipment of PCB-contaminated soils from Texas into Alabama will not only require significant expenditures of state revenues and commitments of state resources, but will also adversely impact the safety, integrity, and conditions of Alabama's highways due to the increased likelihood of accidents

and additional demands placed upon the state's highway personnel. In addition, the action challenged herein would not only deprive the petitioner of landfill capacity within his own state, but will also divert the time and energy of the Alabama Department of Environmental Management to investigate, monitor, and regulate these wastes for years to come.

The petitioner's stake in the outcome of this action is based squarely upon the adverse economic and environmental effects that he has sustained and endured as a consequence of the EPA's actions at the Geneva Industries site. In United States v. SCRAP, 412 U.S. 669 (1973), this honorable Court declared that "standing (is) not confined to those who could

show economic harm . . . . Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life . . . ." 412 U.S. at 686, citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972). In SCRAP, this Court also held that standing should not be denied merely because many people suffer the same injury, stating:

> "The Government urges us to limit standing to those who have been 'significantly' affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved', and it serves to distinguish a person with a direct stake in the outcome of a litigation--even though small--from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of vote, see

> Baker v. Carr, 369 U.S. 186; a five dollar fine and costs, see McGowan v. Maryland, 366 U.S. 420; and a $1.50 poll tax, Harper v. Virginia Bd. of Elections, 383 U.S. 663 . . . . As Professor Davis has put it: 'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.' Davis, Standing: Taxpayers and Others, 35 U.Chi. L.Rev. 601, 613. See also K. Davis, Administrative Law Treatise, §§22.09-5, 22.09-6 (Supp. 1970).

412 U.S. at 689-690 n.14 (emphasis added).

Based upon the above-referenced affidavits, it is clear that the injuries complained of by the petitioner are neither "trifling" nor generalized grievances but are, to the contrary, quite specific, tangible, and qualitatively sufficient to confer standing upon him in this cause. See Saladin v. City of Milledgeville, 812

F.2d 687 (11th Cir. 1987); American Civil Liberties Union of Ga. v. Rabun County Chamber of Commerce, 698 F.2d 1098 (11th Cir. 1983). Given the nature of these interests and the injuries sustained thereto, it is only fair that the petitioner be afforded, at the very least, notice and an opportunity to participate in the government's selection of a remedy for the Geneva Industries site.

Furthermore, it is the petitioner's position that the Court of Appeals committed reversible error inasmuch as it based its decision upon the presumption that the plaintiffs would be unable to prevail even if granted their procedural rights to due process of law. In its opinion, the Court of Appeals stated that:

> "In this case, there is no necessary causal connection between the injury to Alabama's environment and the lack of notice and opportunity to participate in the selection of the remedial action for the Geneva Industries site. Plaintiffs do not challenge the shipment of wastes from Texas to Alabama directly. . . . Rather, plaintiffs seek only a hearing in which to express their views about the appropriate remedial action for this site. The threat to Alabama's environment, however, results solely from the actual shipment and receipt of the wastes. Plaintiffs' injury thus does not result from their lack of participation in the development of the Record of Decision. Plaintiffs' injury also is not likely to be redressed by a reopening of the Record of Decision."

State of Ala. v. EPA, Nos. 88-7677, 89-7024, at 2323 (11th Cir. April 11, 1989) (emphasis added).

First of all, the Court of Appeals is simply incorrect in its analysis of the causality relationship between the petitioner's injury and his lack of notice and inability to participate in

the ROD for the Geneva Industries site. Contrary to the Court's opinion, the shipments of contaminated soils from Texas to Alabama is directly attributable to the Agency's failure to involve the State of Alabama and its citizens in EPA's decision-making process. If the petitioner had been properly afforded the opportunity to submit to EPA comments and additional evidence favoring the implementation of alternative remedial actions for the Geneva Industries site, then the above-referenced shipments could have been averted, either through EPA administrative action or pursuant to judicial review under the Administrative Procedures Act.

Secondly, it was fundamentally unfair and entirely inappropriate for

the Court of Appeals to deny standing to the plaintiffs on the basis of the alleged likelihood that their injuries would not be redressed upon a reopening of the ROD. The Court's reasoning, in effect, conveys to the petitioner the following tautology: "Even if you have the right to be heard and we listen to you, EPA won't listen to you; therefore, we won't listen to you." The petitioner should not be compelled, as a prerequisite to the vindication of his constitutional rights, to demonstrate that he will ultimately prevail at the hearing sought. The Court's ruling in this regard is akin to a prospective determination of harmless error, wherein it assumes EPA's delegated duty of evaluating the petitioners' evidence and comments

concerning the appropriate remedial action for the Geneva Industries site. Unfortunately, the Court of Appeals, in this instance, made EPA's determination without the benefit of the petitioners' evidence or their views. The Court of Appeals thus exceeded the bounds of judicial restraint and improperly usurped, to the detriment of petitioner's due process guarantees, the administrative functions of EPA. Accordingly, the petitioner respectfully contends that the opinion rendered below is due to be reversed.

II.

This Court Should Grant Certiorari and Overturn the Court of Appeals' Erroneous Interpretation of 42 U.S.C. 9613(h) (1980) Which Denies Citizens Who Are Not Potentially Responsible Parties Under CERCLA a Forum Within Which to Litigate Legitimate Statutory and Constitutional Claims.[3]

It is the petitioners' position that the Court of Appeals incorrectly applied 42 U.S.C. §9613(h)(4) (1980) to this action and thereby deprived the petitioners of their only meaningful opportunity for judicial review. The Court of Appeals based its decision to decline jurisdiction on what it perceived to be the "plain language" of 42 U.S.C. §9613(h)(4), to wit:

> "No Federal court shall have jurisdiction under Federal law other than under section 1332 of

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[3]The statutory claims herein are advanced on behalf of the individual petitioner, Don Siegelman, and the State of Alabama.

> Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:
> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site."

The Court of Appeals construed §9613(h)(4) to preclude judicial review of the remedial action challenged until after the remedial action has been completed. The petitioners' cause of action is not, however, a challenge to the remedial action selected by EPA; it is simply a meritorious effort to

restore to the petitioners their statutory and constitutional rights to notice and an opportunity to be heard. The Court of Appeals should not, therefore, have applied §9613(h)(4) to bar judicial review of the petitioners' statutory and due process claims.

Given the underlying purpose of 42 U.S.C. §9613(h), the Appellate Court should, nevertheless, have exercised its jurisdiction over this action. Based upon the interpretation given §9613(h) by numerous courts, it is clear that this section was enacted in order to prevent delays in the cleanup of Superfund sites through protracted litigation by potentially responsible

parties (PRPs).[4] This section, however, was certainly not intended to preclude judicial review of legitimate statutory and constitutional claims alleging irreparable harm. While PRP's will ultimately have an opportunity to redress their grievances and complaints once EPA files a cost recovery action under 42 U.S.C. §9607 (1980), see Dickerson v. Administrator, E.P.A., 834 F.2d 974 (11th Cir. 1987), the petitioners in this action will have no such opportunity. Inasmuch as EPA will bring no monetary claims or subsequent

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[4]See Dickerson v. Administrator, EPA, 834 F.2d 974 (11th Cir. 1987); Wagner Seed Co. v. Daggett, 800 F.2d 310 (2nd Cir. 1986); J.V. Peters & Co. v. EPA, 767 F.2d 263 (6th Cir. 1985); Cabot Corp. v. Environmental Protection Agency, 677 F. Supp. 823 (E.D. Pa. 1988).

enforcement action against the petitioners, the instant case is the only vehicle through which the petitioners' injuries may be redressed.

In Cabot Corp. v. Environmental Protection Agency, 677 F. Supp. 823 (E.D. Pa. 1988), the District Court explained the appropriate scope of judicial review under §9613(h) as it pertains to the due process rights of PRPs and citizens alleging irreparable harm:

> "Due process rights of PRPs are protected by PRPs eventual opportunity to contest unnecessary costs that EPA attempts to recover from them. The expectation that it will have to defend against such claims by PRPs gives EPA an incentive to conduct cleanups in accordance with CERCLA and the NCP. 677 F.Supp. at 828-829 (emphasis added).
>
> "* * * *
>
> "Of course, such an opportunity provides due process only where the PRPs' suit alleges compensable rather than irreparable injury.

> The compatibility with due process of deferring judicial review of claims of compensable harm, as distinguished from the need for prompt review of allegations of irreparable injury, such as harm to public health or the environment, supports the distinction here drawn between PRPs' suits alleging essentially monetary harms and bona fide citizens suits alleging irreparable harm."

677 F. Supp. at 829 n.6 (emphasis added).

In the instant case, "there exists no effective protection of [petitioner's] rights except for this lawsuit". See Chemical Waste Management, Inc. v. EPA, 673 F. Supp. 1043, 1055 (D. Kan. 1987). Accordingly, the Court of Appeals should not have read §9613(h) in such a way as to eliminate any opportunity for the petitioners to be heard. See Id. at 1055. If, to the contrary, §9613(h) can only be interpreted so as to deny

to the petitioners their right to be heard--in effect, to preclude judicial review of legitimate constitutional claims--then it is the petitioners position that said statute is unconstitutional on its face.

Accordingly, the petitioners respectfully request that this Honorable Court remand this cause to the Eleventh Circuit Court of Appeals with instructions that it exercise its jurisdiction over the matters set forth in petitioners' complaint.

III.

This Court Should Grant Certiorari And Overturn The Ruling By The Eleventh Circuit Court of Appeals To Dismiss as Moot The Issue Relating to the Requirement to Post Bond In This Action.

In its opinion, the Eleventh Circuit Court of Appeals incorrectly held that the appellants/cross appellees' challenge to the Dist ict Court's bond requirement was rendered moot pursuant to the Appellate Court's decision to dismiss plaintiffs' cause of action. The issue as to posting bond was submitted to the Eleventh Circuit for review following the District Court's erroneous decision to require the plaintiffs to post bond in favor of the intervenors, the State of Texas and Chem Waste, neither of which were enjoined. It is the petitioners'

contention, based upon the following authority, that the District Court erred by requiring the plaintiffs below to post security in favor of the non-enjoined intervenor defendants. See Powelton Civic Home Owners Ass'n v. Dep't of Housing & Urban Development, 284 F. Supp. 809 (E.D. Pa. 1968) (Redevelopment Authority not enjoined may not demand security); Commonwealth of Puerto Rico v. Price Commission, 342 F. Supp. 1311 (D. P.R. 1972) (non-enjoined intervening party not entitled to security).

The Court of Appeal's failure to address this matter obliges the petitioners to raise their arguments at this juncture in order to avoid a possible waiver of their objections at a future date. Accordingly, the

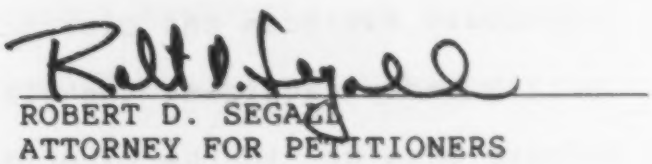
Petitioners maintain that the District Court exceeded its authority by requiring the plaintiffs to post security in favor of the non-enjoined intervenors and, in addition, that the Court of Appeals erred by failing to rule on this issue. The petitioners, therefore, respectfully request that this Court overturn the District Court's order requiring the plaintiffs to post bond or, in the alternative, that this Court remand this issue to the Eleventh Circuit Court of Appeals for adjudication.

CONCLUSION

For the reasons stated, this Court should grant certiorari to decide the important federal questions presented in this case.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL OF ALABAMA
BY-



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CERTIFICATE OF SERVICE

I, Robert D. Segall, a member of the Bar of the Supreme Court of the United States, do hereby certify that this 30th day of August, 1989, I did serve a copy of this petition and a copy of the accompanying appendices upon counsel of record by placing the same in the United States Mail, first class postage prepaid, and properly addressed as follows:

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I further certify that I have served all parties required to be served.

Robert D. Segall
Attorney for Petitioners

89-378

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1989

STATE OF ALABAMA, ex rel. DON SIEGELMAN, ATTORNEY GENERAL, AND DON SIEGELMAN, INDIVIDUALLY, AS A CITIZEN OF THE STATE OF ALABAMA
PETITIONERS,

V.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND LEE M. THOMAS, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, AND CHEMICAL WASTE MANAGEMENT, INC., AND STATE OF TEXAS,
RESPONDENTS.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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9HP

TABLE OF APPENDICES

APPENDIX A

STATE OF ALABAMA	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	
	)	
THE UNITED STATES ENVIRONMENTAL agency; ET AL,	)	CIVIL ACTION NO. 88V-987-N
	)	
Defendants,	)	
	)	
CHEMICAL WASTE MANAGEMENT, INC.; ET AL,	)	
	)	
Intervenors	)	

MEMORANDUM OPINION
AND ORDER

This cause is submitted on the Plaintiffs' motion for an order temporarily restraining Defendants and those working with them transporting or permitting to be transported within the State of Alabama hazardous waste originating from the Geneva Site in Texas pursuant to contract between Chemical Waste Management, Inc.

[Chem-Waste], owner of a hazardous waste dump site in Emelle, Alabama, and the State of Texas.[1] Plaintiffs take the position that the officials of Defendant, The Environmental Protection Agency [EPA], failed to follow the EPA's own regulations and the law pertaining to disposition and removal of said hazardous waste from Texas to Alabama pursuant to the provisions of law set out in 42 U.S.C. §§9601, et seq. In its simplest form, the EPA has agreed to have 47,000 tons of contaminated soil removed from Geneva, Texas, to Emelle, Alabama, without

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[1]Apparently, the contract was formally entered into by Chem-Waste with the Texas Water Commission [TWC], agency for the State of Texas.

notice to or opportunity for conciliation or hearing to the State of Alabama or its citizens. In the opinion of this Court, it is unnecessary that this Court at this time consider other allegations of improprieties in the act of the EPA for the reasons set out hereinafter.

This Court has allowed the State of Texas on behalf of the Texas Water Commission [TWC] and Chem-Waste to intervene in this suit, but because of information from the attorneys for the EPA that transportation of the hazardous waste is to begin on this date, this Court will consider the propriety of entering a temporary restraining order at this time against the Defendants.

This Court is of the opinion that, independent of constitutional requirements, Congress saw the basic need, and created a statutory scheme, for disposal of hazardous waste materials after a full opportunity for all affected persons, including States to present their problems and to have their burdens fully considered by experts in the field of hazardous waste. 42 U.S.C. §§9601, et seq. In §9601(21), the term "person" is defined to include the United States Government, a State or any political subdivision thereof. 42 U.S.C. §9601(29) adopts the definition set out in 42 U.S.C. §6903(5) for the term "hazardous waste", meaning "a solid waste or combination of solid wastes which *** may (A) cause, or

significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly stored, transported, or disposed of, or otherwise managed."

The parties seem to agree that the EPA commenced considering the propriety of removing this waste from Texas prior to September, 1986, and on September 18, 1986, the EPA issued a Record of Decision [ROD] for the Geneva Site which provided for removal of 36,000 tons of the toxic waste but had no provision for disposition of the waste within the State of Alabama. Subsequently, in the summer of 1988, the TWC and Chem-Waste entered the

contract for Chem-Waste to remove the toxic waste to the Alabama site. The parties also seem to agree that no notice of any of these facets were given in Alabama and no waste permit was issued to the Alabama facility until its waste permit became effective on July 11, 1988, and in a letter dated September 29, 1988, the EPA finally notified Alabama officials that Chem-Waste's Emelle facility had complied with the requirements of the EPA and was in compliance with its hazardous waste permit. The September 29, 1988, letter from the EPA to Alabama officials notified that the waste shipments would begin on or after October 7, 1988. No conciliation between Alabama, Texas and the EPA has taken place. Subsequently, the parties

agreed to delay commencement of shipment until October 21, 1988, in order to give the parties time to brief the Court and the Court time to consider the issues in the case.

An understanding of the history of hazardous waste is helpful in understanding the purpose and effect of the legislation in the field. As this country progressed from an agricultural to an industrial economy, Congress began to understand that the wages of progress sometimes involve death or great bodily harm--that some of the great benefits to the public are accompanied by great potential harm to individual members of the public. History has demonstrated that known and unknown hazards are sometimes associated with industrial progress and

that, occasionally, great stores of hazardous wastes are accumulated before anyone is aware of potential harm. Persons and States exposed to these dangers, in fairness and justice, must work together to eliminate or diminish insofar as possible such dangers. This working together can best be done with counsel and guidance from, and subject to the ultimate judgment of, experts in the field of these dangers--the hazardous wastes of progress. Congress recognized that the fear--indeed the potential panic--associated with the movements of stores of such hazardous waste would sometimes be outweighted by the diminution of the hazard by removal of the waste to isolated areas or areas better qualified to minimize the danger. The dangers and fears of

hazardous wastes, like the dangers and fears of war, must be shared by all but endured by those best able to survive the ordeal.

Perhaps the huge layer of chalk underlying the Emelle, Alabama, hazardous waste depository qualifies that area and the State of Alabama and its citizens as those best able to survive such an ordeal as the depositing of 47,000 tons of PCB may involve. On the other hand, perhaps, as Plaintiffs now allege, the hazards associated with said wastes can best be disposed of by burning in the State of Texas.

Alabama and its citizens, by this litigation, point out that there is a natural fear associated with any State's receiving such a large shipment

of what the experts--the EPA--have designated as hazardous waste and that, before the citizens of the receiving State should be so exposed, Congress intended and legislated that they be given an opportunity to conciliate with the donor State and the EPA for the purpose of minimizing a common peril. This Court firmly agrees.

Congress set up a scheme for conciliation with notice and a hearing for affected States:

> "The President shall consult with the affected State or States before determining any appropriate remedial actions to be taken pursuant to the authority granted under subsection (a) of this section." 42 U.S.C. §9604(c)(2).

The suggestion of the EPA that the recipient State of 47,000 tons of a hazardous waste is not an "affected" State is unacceptable to this Court.

If the waste is not hazardous, why has the EPA so classified it? Accepting the hazardous nature of the waste, to whom is it hazardous? Obviously, it must be hazardous to those nearest to it--the people of Texas while the waste is in Texas, the people of Alabama while in Alabama. Alabama is an affected State and, before the decision was made to dump on Alabama, Alabama was entitled to notice and an opportunity to be consulted. Congress so legislated.

This Court has "jurisdiction over all controversies arising under this chapter [Chapter 103 of 42 U.S.C.] without regard to the citizenship of the parties or the amount in controversy." 42 U.S.C. §9613(b). As pointed out by Defendants, exceptions

to jurisdiction are made in §9613(h), but the bar to jurisdiction applies to this suit under §9659 only if the removal of the waste occurs after an on-site remedy of the hazardous nature of the waste. §9613(h)(4).

> "(h) No federal court shall have jurisdiction (impertinent exceptions omitted) to review any challenges to removal or remedial action selected under section 9604 *** except one of the following: *** (4) An action under section 9659 *** alleging that the removal or remedial action *** was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site."

In 42 U.S.C. §9601(24), "remedial action" is defined as "actions consistent with permanent remedy taken instead of or in addition to removal actions *** to prevent or minimize the release or threatened release of hazardous substances so that they do

not migrate to cause substantial danger to *** public health or welfare or the environment." Here, no on-site remedial action is contemplated by Defendants. Indeed, the Plaintiffs in this case suggest this very remedy--the on-site burning of the hazardous waste. If the hazard had been destroyed on-site by fire, there would have been no cause for public notice to and a hearing for Alabama and its citizens. The owners of the Emelle depository, being thereby freed of responsibility for danger to the public, could have accepted the harmless waste as they saw fit. The exception to jurisdiction of this Court set out in §9613(h) does not apply under the pleadings in this case.

The Court of Appeals for the Eleventh Circuit in United States v. Lambert, 695 F.2d 536, 539 (11th Cir. 1983), itemized the requirements for a temporary restraining order or a preliminary injunction as follows: (1) A likelihood that the plaintiff will prevail on the merits; (2) a substantial threat that the plaintiff will suffer irreparable injury if the preliminary relief is not granted; (3) the threatened injury to the plaintiff outweighs the threatened harm to the defendant; and (4) the granting of the injunction will not disserve the public interest.

This Court is of the opinion that the ROD issued in 1986 was substantially changed by the alteration of September 18, 1988. The amendment

allowed an additional 11,000 tons of toxic waste for a total of 47,000 tons of toxic waste to be brought to the State of Alabama without notice to the State or its citizens. Said change in the ROD was a substantial change thereof to be justified only after notice to Alabama and an opportunity to conciliate with Texas and the EPA. Because of the failure of the President or his designee to attempt to conciliate with Alabama, a State affected by the proposed removal, the EPA had no authorization to allow the removal in question. The Court, therefore, finds that there is a substantial likelihood that Plaintiffs will prevail on the merits of their claim; that, because of the nature of and the enormity of the proposed

removal into Alabama, there is a substantial threat that the Plaintiffs will suffer irreparable injury if the preliminary injunction is not granted; and that, because the EPA, with knowledge of the threat to the Texas citizens as early as 1986, did not propose a removal until October 7, 1988, this Court concludes that the EPA itself concluded that the dangers to Texas residents did not justify extreme haste in removal. This Court, therefore, knowing of the possibilities of accidents, leakage, etc., associated with removal, is convinced that the threatened injuries to the Plaintiffs outweigh the threatened injuries to the Defendants in maintaining the status quo. Also, for the same and additional reasons, the stay pending full

consideration of all issues in the matter will not disserve the public interest but will encourage the EPA to more cautiously follow its own rules in the future, all to the added safety of the public as a whole.

Finally, based upon the uncontroverted and undisputed evidence before this Court, the Court finds that no notice or opportunity to be heard was provided to the Plaintiffs prior to the issuance of the ROD for the Geneva Site, which deprived them of their constitutional rights of due process of law under the Fifth Amendment to the United States Constitution. Based upon such a deprivation, the Plaintiffs are threatened with irreparable harm for which there is no remedy but for the action of this Court.

Therefore, it is ORDERED by this Court that Defendants, the United States Environmental Protection Agency and its Administrator, Lee M. Thomas, their officers, employees and all persons acting by, through and for them [U.S. Government Defendants] be, and they are hereby, temporarily restrained from authorizing or engaging in (1) implementating the Geneva Site ROD and taking any remedial action pursuant thereto; (2) funding by federal government monies, either through use of the Superfund or otherwise, such remedial action; and (3) approving or otherwise facilitating the transportation of the Geneva Site contaminated soil from the State of Texas to the State of Alabama.

It is this Court's understanding, based upon representations made in open court by the Assistant Attorney General of the State of Texas, that the U.S. Government Defendants have already released to Intervenor State of Texas federal funds to be utilized for the implementation of the remedial action approved by the U.S. Government Defendants in their ROD for the Geneva Site. Accordingly, it is further

ORDERED by this Court that the U.S. Government Defendants take any and all actions necessary to abate and/or revoke such action and the utilization of such federal funds by the Intervenor State of Texas for the implementation of the remedial action for the Geneva Site. It is further

ORDERED by this Court that this Temporary Restraining Order is hereby granted pending a hearing, which is set for October 31, 1988, at 8:00 a.m., in Montgomery, Alabama, by agreement of all parties herein, on the posting vel non of security (and the amount thereof) for costs and damages as may be incurred or suffered by any one or more of the Defendants, including Intervenors Chem-Waste and the State of Texas, as a proximate result of any wrongful restraint or injunction. This Temporary Restraining Order shall expire on October 31, 1988, at 5:00 p.m., unless it is further extended by Order of the Court.

It is further ORDERED by this Court that the trial of this case is hereby scheduled for December 21, 1988, at

9:00 a.m., in Montgomery, Alabama.

DONE this 21st day of October, 1988.

R. E. Varner
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

STATE OF ALABAMA, Etc.; ET AL,	)	
Plaintiffs,	)	
VS.	)	
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ET AL,	)	CIVIL ACTION NO. 88V-987-N
Defendants,	)	
CHEMICAL WASTE MANAGEMENT, INC.; ET AL,	)	
Intervenors	)	

ORDER ON PRELIMINARY INJUNCTION

For the reasons set out in the Memorandum Opinion and Order entered by this Court on October 21, 1988, this Court is of the opinion that the findings therein are correct by a preponderance of the evidence and that

the Defendants and those in active concert or participation therewith should be preliminarily enjoined as prayed for in the original Complaint.

Therefore, it is ORDERED by this Court that Defendants, the United States Environmental Protection Agency [EPA] and its Administrator, Lee M. Thomas, their officers, agents, servants, employees and all persons in active concert or participation with them [U.S. Government Defendants] be, and they are hereby preliminarily enjoined from authorizing or engaging in (1) implementating the Geneva Site Record of Decision [ROD] and taking any remedial action pursuant thereto; (2) funding by federal government monies, either through use of the Superfund or otherwise, such remedial action; and

(3) approving or otherwise facilitating the transportation of the Geneva Site contaminated soil from the State of Texas to the State of Alabama. Nothing in this Order shall be construed to enjoin or restrain a shipment of waste from Texas to Indiana, which shipment was approved by the EPA in association with the plan for the Alabama shipment.

It is this Court's understanding, based upon representations made in open court by the Assistant Attorney General of the State of Texas, that the U.S. Government Defendants have already released to Intervenor State of Texas federal funds to be utilized for the implementation of the remedial action approved by the U.S. Government Defendants in their ROD for the Geneva Site. Accordingly, it is further

ORDERED by this Court that the U.S. Government Defendants take any and all actions necessary to abate and/or revoke such action and the utilization of such federal funds by the Intervenor State of Texas for the implementation of the remedial action for the Geneva Site. It is further

ORDERED by this Court that Plaintiffs post bond for security in this case in the amount of $564,970.00.

DONE this 31st day of October, 1988.

R. E. Varner
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

STATE OF ALABAMA, Etc.; ET AL,	)	
Plaintiffs,	)	
VS.	)	
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ET AL,	)	CIVIL ACTION NO. 88V-987-N
Defendants,	)	
CHEMICAL WASTE MANAGEMENT, INC.; ET AL,	)	
Intervenors.	)	

ORDER

In accordance with the Opinion entered in the above-styled cause on this date, it is ORDERED, ADJUDGED and DECREED by this Court:

1. That Plaintiffs' Motion for Partial Summary Judgment filed herein

October 31, 1988, be, and the same is hereby, granted and Defendants, the United States Environmental Protection Agency and its Administrator, Lee M. Thomas, their officers, employees and all persons acting by, through and for them [U.S. Government Defendants], are hereby ORDERED to reopen the Record of Decision dated September 18, 1986, for the Geneva Industries Site and reconsider the remedial action to be taken at the Geneva Industries Site after statutory mandated notice and reconciliation with the State of Alabama.

2. That the Cross-Motion for Summary Judgment filed herein November 10, 1988, by Intervenor State of Texas be, and the same is hereby, denied. The Motion for Continuance contained in

said Cross-Motion for Summary Judgment is hereby denied as moot.

3. That the Motion for Summary Judgment filed herein November 10, 1988, by Intervenor Chemical Waste Management, Inc., be, and the same is hereby, denied.

4. That the Federal Defendants' Motion to Dismiss or, in the alternative, Motion for Partial Summary Judgment filed herein November 10, 1988, be, and the same is hereby, denied.

5. That the above-styled cause is hereby dismissed, and the Court hereby reserves ruling on the question of attorneys' fees, costs, etc.[1]

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[1]The primary issues in this case are pending on an interlocutory appeal in the United States Court of Appeals for the Eleventh Circuit. This final Order herein, except for the question of attorneys' fees and costs, is

DONE this 15th day of December, 1988.

R. E. Varner
United States District Judge

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[1] entered with the hope that the disposition by the Court of Appeals may give full guidance to the parties as to pertinent law. Thereafter, the question of attorneys' fees and costs may be fully determined.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

STATE OF ALABAMA, Etc.; ET AL,	)	
Plaintiffs,	)	
VS.	)	
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ET AL,	)	CIVIL ACTION NO. 88V-987-N
Defendants	)	
CHEMICAL WASTE MANAGEMENT, INC.; ET AL,	)	
Intervenors	)	

OPINION

This cause is submitted on Plaintiffs' Motion for Partial Summary Judgment filed herein October 31, 1988, and on all the materials filed in support of or in opposition to said motion.

This case involves the proposed shipment of 47,000 tons of contaminated soil from Geneva, Texas, to Emelle, Alabama. The pertinent facts of this case were extensively set out in this Court's Memorandum Opinion and Order dated October 21, 1988, and will not be restated here.

Plaintiffs move this Court for a partial summary judgment in their favor as to Counts One, Five, Eight and Nine of their Complaint, which ask this Court to grant a permanent injunction requiring the Defendants, the United States Environmental Protection Agency [EPA] and Lee M. Thomas, to (1) reopen the Record of Decision dated September 18, 1986, for the Geneva Industries Site and (2) allow Plaintiffs, after proper notice, an opportunity to be

heard and participate in the development of any remedial action at the Geneva Industries Site. Plaintiffs also request the Court to tax their costs, disbursements and attorneys' fees against Defendants.

Counts One, Five, Eight and Nine of Plaintiffs' Complaint all concern the issue of whether or not Defendant EPA provided the State of Alabama proper notice and an opportunity to be heard concerning the decision to send said contaminated soil to the Emelle facility. Plaintiffs' claims are based on the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [Act], regulations adopted pursuant thereto and the Fifth Amendment to the United States Constitution.

In opposition to Plaintiffs' Motion for Partial Summary Judgment, Defendants contend that the Complaint should be dismissed for lack of jurisdiction and improper venue as notice is not required under either the Act or the Constitution and, even if notice is required, there are material facts in dispute.[1]

In determining whether summary judgment is appropriate, the Court should decide whether the moving party has met his burden of showing that there is no genuine issue of material

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[1]The Court has previously ruled on Defendants' claims concerning jurisdiction, venue and whether notice was required in its Memorandum Opinion and Order dated October 21, 1988. Therefore, those claims will not be discussed further.

fact and that he is entitled to judgment as a matter of law. Washington v. Dugger, No. 87-3342, Slip Op. at 460 (11th Cir. Nov. 28, 1988). The moving parties, Plaintiffs, have shown to this Court by affidavits that Plaintiffs did not receive notice from the Defendants before a decision was made to send the contaminated soil to Alabama.

Defendants argue that Plaintiffs, in fact, had notice in the summer of 1988 and had an opportunity to discuss the decision to send said soil to Alabama with officials of the EPA, including Defendant Thomas, Administrator of the EPA. Copies of letters showing correspondence between the State of Alabama and the EPA are included as exhibits to Defendants'

opposition filed October 12, 1988, to Plaintiffs' motion for preliminary injunction. However, these letters are not proper evidence to be considered on motion for summary judgment and, therefore, were not taken into consideration.

While the Code sections pertinent to this case require a predetermination notice, the evidence properly submitted to the Court shows that the determination to ship the soil to Alabama was made prior to the State of Alabama's having received any notice of such a shipment. It is possible to waive notice in some instances. There is no competent evidence in this case to show whether Alabama officials did or did not waive any notice by corresponding and meeting with

officials from Washington this summer, but, clearly the State of Alabama did not originally waive notice of the original proceedings before the determination was made to send the soil to Alabama.

Therefore, Plaintiffs' Motion for Partial Summary Judgment will be granted.[2] Plaintiffs moved for summary judgment as to Counts One, Five, Eight and Nine of their Complaint. The other counts of the Complaint concern the question of whether alternative remedial methods

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[2]The Federal Defendants and both, Intervenors, Chemical Waste Management, Inc., and the State of Texas, filed motions for summary judgment or motions to dismiss with their responses to Plaintiffs' Motion for Partial Summary Judgment. These other motions for summary judgment and motions to dismiss will be denied.

would have been the proper method forthis contaminated soil. Those matters should be determined after conciliation with the State of Alabama by the EPA (President's appointee).

An Order will be entered in accordance with this Opinion.

DONE this 15th day of December, 1988.

R. E. Varner
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Nos. 88-7677 & 89-7024

- - - - - - - - - - - - - - -

(U.S. Docket No. 88-V-987)

STATE OF ALABAMA, etc., et al.,

Plaintiffs-Appellees,
Cross-Appellants,

versus

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and
LEE M. THOMAS,

Defendants-Appellants,

STATE OF TEXAS; and
CHEMICAL WASTE MANAGEMENT, INC.,

Intervenors-Appellants,
Cross-Appellees.

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Appeals from the United States
District Court
for the Middle District of Alabama

- - - - - - - - - - - - - - -

(April 18, 1989)

Before JOHNSON, HATCHETT and COX,
Circuit Judges.

JOHNSON, Circuit Judge:

This appeal arises from the issuance of a temporary injunction preventing the shipment of soil contaminated with PCBs and other toxic wastes from the Geneva Industries, Inc., toxic waste site in South Houston, Texas, to Chemical Waste Management (CWM)'s toxic waste treatment facility in Emelle, Alabama. The State of Alabama and its governor, attorney general, and head of the department of environmental management, acting in their capacities as private citizens, filed suit in federal district court seeking to enjoin shipment of these wastes. Plaintiffs asserted both constitutional claims and claims based on the Comprehensive Environmental Recovery, Compensation, and Liability Act, 42 U.S.C.A. §9601 et

seq. (CERCLA).

The district court issued a preliminary injunction halting EPA's participation in the remedial action selected to clean up the Geneva Industries site, and the EPA, along with intervenors State of Texas and CWM, appealed. During the pendency of the appeal, the district court granted partial summary judgment to plaintiffs enjoining the EPA from implementing its remedial action plan to clean up the Geneva Industries site until plaintiffs have had the opportunity to comment on the remedial action plan. This Court granted defendants' motion to consolidate the appeal from the preliminary injunction with the appeal from the grant of summary judgment. We reverse the grant of preliminary

injunction, reverse the grant of summary judgment, dissolve the permanent injunction, and dismiss this case for lack of subject matter jurisdiction.

I. FACTS

In 1983, Texas submitted the site of Geneva Industries, Inc.'s former petrochemical plant in South Houston, Texas, to be included on the National Priorities List for cleanup by the EPA pursuant to CERCLA. The site is contaminated with polychlorinated biphenyls (PCBs) and other toxic chemicals. The EPA placed this site on the National Priorities List, where it ranked number 37 out of over 700 sites listed. In 1983 and 1984, EPA

conducted a planned removal[1] to stabilize the site and to reduce the immediate health and safety risks of the contamination to residents in the area.

In 1984, the Texas Department of Water Resources, the state agency operating in cooperation with the EPA to clean up the site, contracted for a Remedial Investigation and Feasibility Study. This is a preliminary step in

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[1]A removal is a short-term action taken to neutralize the immediate health and safety risks created by toxic wastes. See 42 U.S.C.A. §9601(23). In contrast, remedial action, such as the action challenged in this case, "means those actions consistent with permanent remedy taken instead of or in addition to removal actions . . . . [T]he term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials." 42 U.S.C.A. §9601(24).

cleaning up a hazardous waste site under CERCLA. The contractor evaluated alternative remedial action plans and presented them to the state. In 1986, the Feasibility Study describing the alternatives was released for public comment and review. A public meeting was held in May 1986, and the public comment period was held open until June 10, 1986. On September 18, 1986, the Regional Director of the EPA issued the Record of Decision memorializing the alternative chosen to clean up the Geneva Industries site. The EPA selected offsite disposal of the hazardous wastes. At the time, there were only a limited number of treatment facilities in the United States capable of handling these toxic wastes. Among those facilities was CWM's hazardous

waste treatment facility in Emelle, Alabama.

There are two separate federal statutes regulating the Emelle, Alabama, facility. The Toxic Substances Control Act, 15 U.S.C.A. §2601 et seq. (TSCA), regulates the handling, storage, and disposal of wastes contaminated with PCBs. The Resource Conservation and Recovery Act, 42 U.S.C.A. §6901 et seq. (RCRA), regulates other hazardous wastes. CWM's Emelle, Alabama, facility is licensed under both federal statutes and under complementary state regulations[2] to handle the wastes

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[2]Alabama's Hazardous Wastes Management and Minimization Act, Ala. Code §22-30-1 et seq., governs CWM's Emelle facility. CWM cannot operate this facility without approval from the

located at the Geneva Industries toxic waste site. The TSCA and the RCRA ensure that CWM's toxic waste storage and treatment facility poses the least possible risk to human health and safety.

The TSCA establishes a regulatory framework for the safe handling and disposal of certain highly toxic wastes. Regulations adopted pursuant to the TSCA control the storage and disposal of PCBs. See 40 C.F.R.

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[2]State of Alabama. See generally Ala. Code §22-30-12(c) ("no person may commence or continue . . . operation of any hazardous waste treatment, storage or disposal facility without having applied for and obtained a permit. . .") Although CWM has not yet received a final operating permit, the State of Alabama authorized CWM to operate its Emelle facility under interim status. See Ala. Code §22-30-12(i).

§761.75(b)(8). The regulations establish very specific soil, hydrological, geological, and topographical requirements for facilities that dispose of wastes contaminated with PCBs. 40 C.F.R. §761.75(b)(1), (2), (3), (4), and (5). The regulations also provide for monitoring the groundwater in the vicinity of the chemical waste landfill. 40 C.F.R. §761.75(b)(6). The permit application process ensures that licensed treatment facilities comply with these requirements. 40 C.F.R. §761.75(c)(3).

The RCRA establishes a framework for regulating the storage and disposal of hazardous wastes in general. Operators of hazardous waste treatment, storage, and disposal facilities must

comply with detailed operating regulations, 42 U.S.C.A. §6924; see generally 40 C.F.R. Part 264. This includes stringent permit application requirements and regulations. See 42 U.S.C.A. §6925; see generally 40 C.F.R. Part 270. The regulations promulgated pursuant to the RCRA ensure that facilities disposing of hazardous wastes do so in a manner consistent with eliminating health and environmental risks caused by the hazardous wastes. A permit is valid only for a maximum term of ten years, 40 C.F.R. §270.50(a), and each permit for a land disposal facility is reviewed after five years and is subject to modification at that point. 40 C.F.R. §270.50(d). A permit may be terminated for noncompliance with any

of its conditions, 40 C.F.R. §270.43(a)(1), for failure to disclose material information or misrepresentation of material facts, 40 C.F.R. § 270.43(a)(2), or if the activity "endangers human health or environment" and can be regulated only through modification or termination of the permit. 40 C.F.R. §270.43(a)(3).

CWM's Emelle, Alabama, hazardous waste treatment facility received permits under both the TSCA and the RCRA. This facility thus has complied with elaborate federal regulations designed to ensure the safe disposal of hazardous wastes, including wastes contaminated with PCBs. To the extent these federal regulations can and do provide for the safe treatment and disposal of toxic wastes, CWM's Emelle,

Alabama, facility poses no threat to the health and safety of the residents of Emelle or to other Alabama residents. This applies to the material shipped from South Houston, Texas, as well as to the material the facility has handled from Tennessee and from locations within the State of Alabama.

The State and citizens of Alabama participated throughout the process by which CWM received permits to handle hazardous wastes at its Emelle facility. At the time of the original application in May 1978, the State of Alabama strongly supported the grant of the permits. The facility began operating under interim status authorization in November 1980. See 42 U.S.C.A. §6935(e). In December 1984,

EPA, CWM, and the state entered into a Consent Agreement authorizing the facility to handle PCBs. In 1985, citizens of the State of Alabama received notice of the proposed licensing of the Emelle facility for disposal of PCBs under the TSCA. EPA provided twice the period for public comment normally accorded such decisions, held a public information session lasting 7-1/2 hours in Livingston, Alabama, and held an open public meeting. EPA received 78 oral and 145 written comments on the proposed permit, and responded in detail to each comment. The PCB disposal permit was challenged unsuccessfully in federal court under the Administrative Procedures Act. After responding in an acceptable

manner to all challenges, the final permit became effective July 11, 1988.

CWM received the contract to dispose of the Geneva Industries site wastes pursuant to a closed bidding contractor selection process. In January 1988, the Texas Water Commission, successor to the Texas Department of Water Resources, solicted sealed bids from contractors for the various projects called for in the Record of Decision. In response, CWM offered the lowest bid for disposal of the contaminated soil, and received the contract on April 8, 1988. The EPA did not select CWM's Emelle, Alabama, toxic waste facility in the Record of Decision for cleanup of the Geneva Industries site. In the Record of Decision, the EPA decided only that

offsite disposal was the best way to clean up the Geneva Industries site. The EPA made this decision in September 1986. The sealed bid solicitation process followed, and EPA granted CWM the contract to dispose of the wastes in April 1988.

In June 1988, Alabama legislators, including Governor Hunt and Attorney General Siegelman, learned of the proposed shipment of toxic wastes from Texas to Alabama. On June 22, 1988, Governor Hunt wrote to the Administrator of the EPA requesting a delay in the shipment. On June 23, 1988, Attorney General Siegelman wrote to the Administrator requesting information about the nature of the Geneva Industries site toxic wastes. The EPA delayed the shipment to respond

to the letters in detail. EPA officials also met with Alabama Congressmen and state legislators to address their concerns. After considering the concerns expressed by the State of Alabama, the EPA decided to follow the original remedial action plan set out in the Record of Decision.

Shortly thereafter, the State of Alabama and three individual citizens of Alabama, Governor Hunt, State Attorney General Siegelman, and Leigh Pegues, head of the state department of environmental management, filed suit against the EPA seeking to enjoin shipment of the hazardous wastes from Texas to Alabama. The district court granted a preliminary injunction enjoining the EPA and its administrator and employees from executing the Geneva

Industries site remedial action plan, from funding the remedial action, or from approving or otherwise facilitating the transportation of hazardous wastes from Texas to Alabama. CWM and the State of Texas intervened, and, along with the EPA, appeal the grant of this preliminary injunction. Prior to our consideration of this appeal, the district court granted partial summary judgment to the plaintiffs, ordered EPA to reopen its Record of Decision for the Geneva Industries site, and dismissed the remainder of the case. Defendants appealed. We consolidated the appeals and address both in this decision.

II. DISCUSSION

The district court had jurisdiction to grant summary judgment and to

dismiss the suit despite the pending interlocutory appeal. Cf. United States v. White, 846 F.2d 678, 693 n.23 (11th Cir. 1988). However, that decision did not divest this Court of its jurisdiction over the interlocutory appeal of the preliminary injunction. See generally Griggs v. Provident Consumer Discount Co, 459 U.S. 56 (1982)(per curiam). Although the injunction itself did not survive the grant of summary judgment and dismissal, Cypress Barn, Inc. v. Western Electric, 812 F.2d 1363 (11th Cir. 1987), we still have jurisdiction over this appeal. Cf. University of Texas v. Camenisch, 451 U.S. 390 (1981) (fact that preliminary injunction itself is moot does not moot appeal from grant of preliminary injunction).

In addition, although no final judgment has been entered pursuant to Fed. R. Civ. P. 54(b), we have jurisdiction over the appeal from the grant of summary judgment because the district court granted a mandatory permanent injunction compelling EPA to reopen its Record of Decision. See 28 U.S.C.A. §1291.

Plaintiffs challenge the EPA's failure to provide them with notice and a hearing before choosing the appropriate remedial action for the Geneva Industries toxic waste site in South Houston, Texas. These claims have two bases, the first constitutional and the second statutory. Plaintiffs argue that the EPA could not implement this remedial action plan without providing them with

notice and an opportunity for a hearing without violating the due process clause of the fifth amendment. The State of Alabama argues it is an "affected state" within the meaning of 42 U.S.C.A. §9604(c)(2), and thus was entitled to notice and an opportunity to participate in the choice of offsite disposal as the appropriate remedial action for the Geneva Industries toxic waste site. The individual plaintiffs assert they were entitled to notice and an opportunity to participate pursuant to 42 U.S.C.A. §9613(k)(2)(B). Finally, all plaintiffs argue EPA failed to comply with the publication requirements of 42 U.S.C.A. §9617. Plaintiffs base jurisdiction on four separate provisions: 28 U.S.C.A. §1331, which gives federal courts

jurisdiction over claims arising under the Constitution; 42 U.S.C.A. §9613(b), which gives federal courts jurisdiction over challenges to actions taken pursuant to CERCLA; 42 U.S.C.A. §9659(a), which gives persons authority to challenge remedial actions selected under CERCLA; and 5 U.S.C.A. §702, which gives federal courts jurisdiction over challenges to administrative agency actions. We address each of these claims in turn.

A. Constitutional Claims

Plaintiffs assert that the denial of notice and opportunity for a hearing before implementation of the remedial action plan violates their due process rights under the fifth amendment. Standing is a jurisdictional prerequisite to suit in federal court.

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475-76 (1982). The State of Alabama is not included among the entities protected by the due process clause of the fifth amendment, South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966), and lacks standing to claim that the EPA was constitutionally compelled to provide it with notice and an opportunity to be heard. See generally Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 218-19 (1974) (plaintiff must assert legally cognizable injury in fact, whether real or threatened, before federal courts have jurisdiction). The individual plaintiffs also fail to satisfy the standing requirements necessary for the

exercise of federal jurisdiction over their constitutional claims.

Standing involves two aspects. The first is the minimum "case or controversy" requirement of Article III. That requirement mandates that the plaintiff himself or herself suffer actual or threatened injury, resulting from the action challenged, that is likely to be redressable in a judicial action. Warth v. Seldin, 422 U.S. 490, 499 (1975). In addition, the Supreme Court has established several requirements based on prudential considerations. A litigant generally may not assert the rights of another person, Allen v. Wright, 468 U.S. 737, 751 (1984), or present generalized grievances about the conduct of government which are more appropriately

addressed in the representative branches, United States v. Richardson, 418 U.S. 166, 174-75 (1974), and the litigant's complaint must fall within the "zone of interests" protected by the law invoked. Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 153 (1970).

Plaintiffs allege two types of real or threatened injury caused by defendants' actions.[3] First, plaintiffs argue that shipment of these

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[3]To the extent plaintiffs also seem to assert injury based on the out-of-state nature of these wastes, the Supreme Court has already held that the commerce clause bars such a distinction. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). Although Congress may override the commerce clause by express statutory language, South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984), it has not done so in enacting CERCLA.

toxic wastes will cause increased expenditures of tax revenues through increased costs of highway maintenance and environmental safety measures. Plaintiffs base standing on their status as taxpayers. This does not satisfy the minimum constitutional requirement of injury in fact necessary for the exercise of federal jurisdiction. See generally Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (plaintiff must allege "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"). Although an injury need only be "trifling," it must nevertheless be a real or threatened injury suffered by one of the plaintiffs. See Schlesinger, 418 U.S.

at 220-21 ("Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution."). In certain limited circumstances, where an expenditure itself would violate an express constitutional provision, a taxpayer may have standing to challenge the expenditure. See Flast v. Cohen, 392 U.S. 83 (1968) (taxpayer could challenge expenditure that violated establishment clause). Otherwise, however, plaintiffs as taxpayers do not have standing to challenge governmental action. See, e.g., Valley Forge, 454 U.S. at 476-82 (taxpayers lacked standing to challenge government transfer of property to religious

organization on establishment clause grounds); Schlesinger, 418 U.S. at 222 (citizens as taxpayers have no standing to compel governmental compliance with federal statute). In this case, plaintiffs do not allege that the increased expenditure of state funds, if it occurs, would violate any constitutional provision. Thus, plaintiffs lack standing to challenge this action based on their status as taxpayers alone.

Second, plaintiffs allege injury based on the threat to the environmental quality of the State of Alabama. This claim alleges the requisite injury in fact for the federal court to exercise subject matter jurisdiction. See generally Japan Whaling Ass'n v. American

Cetacean Society, 478 U.S. 221 (1986) (whale watching group has standing to challenge failure of Secretary of Commerce to cite Japan for overharvesting whales); United States v. SCRAP, 412 U.S. 669 (1973) (potential adverse environmental impact of railroad rate change sufficient); cf. Callaway v. Block, 763 F.2d 1283 (11th Cir. 1985) (peanut farmers had standing to appeal denial of injunction against Secretary of Agriculture preventing implementation of new regulations). There must also be a connection between the injury alleged and the challenged action, however. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976) (injury must be able to be traced to the challenged action). Generalized

grievances about the conduct of government are insufficient. See United States v. Richardson, 418 U.S. 166, 175 (1974). The injury must be a consequence of the challenged action. See Valley Forge, 454 U.S. at 473 ("The exercise of judicial power . . . is therefore restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate.") (emphasis added).

In this case, there is no necessary casual connection between the injury to Alabama's environment and the lack of notice and opportunity to participate in the selection of the remedial action for the Geneva Industries site. Plaintiffs do not challenge the shipment of wastes from Texas to

Alabama directly. To the extent the injury alleged may result from the operation of CWM's Emelle, Alabama, facility, plaintiffs do not challenge the permits that allow CWM to receive PCBs.[4] Rather, plaintiffs seek only a hearing in which to express their views about the appropriate remedial action for this site. The threat to Alabama's environment, however, results solely from the actual shipment and receipt of the wastes. Plaintiffs' injury thus does not result from their lack of participation in the development of the Record of Decision. Plaintiffs' injury also is not likely

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[4]This includes an agreement the State of Alabama entered into with CWM in December 1984 specifically authorizing the Emelle facility to receive PCBs.

to be redressed by a reopening of the Record of Decision. Because they have failed to allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief", Allen v. Wright, 468 U.S. at 751, the individual plaintiffs lack standing to challenge this shipment under the fifth amendment.

Plaintiffs argue that this is their only chance to challenge this decision. Even assuming this assertion is true, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." Schlesinger, 418 U.S. at 227. Plaintiffs simply are not entitled to raise these constitutional claims. Consequently,

the constitutional claims raised by the plaintiffs must be dismissed for lack of standing.

B. Statutory Claims

Alabama argues that it is an "affected state" within the meaning of 42 U.S.C.A. §9604(c)(2), and that it was entitled to receive notice and an opportunity for a hearing before final selection of the remedial action plan.[5] The individual plaintiffs assert that they were entitled to notice and an opportunity to comment on the remedial action plan prior to implementation under 42 U.S.C.A.

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[5]That section provides: "The President shall consult with the affected State or States before determining any appropriate remedial action to be taken pursuant to the authority granted under subsection (a) of this section."

§9613(k)(2)(B). Plaintiffs also assert EPA failed to publish the Record of Decision according to the requirements of 42 U.S.C.A. §9617. Plaintiffs assert they have the authority to bring this action to compel compliance with the provisions of CERCLA under section 310(a), 42 U.S.C.A. §9659(a). That section allows any person to commence a civil action against the EPA to compel compliance with CERCLA's provisions. See 42 U.S.C.A. §9659(a)(2). "Person" includes the State of Alabama. 42 U.S.C.A. §9601(21).

Plaintiffs base federal jurisdiction over their statutory claims on two provisions. First, plaintiffs assert that the 1986 amendments to CERCLA grant federal courts jurisdiction over this action.

Plaintiffs rely on section 113(b), 42 U.S.C.A. §9613(b), which grants federal courts exclusive original jurisdiction over controversies arising under CERCLA, and section 310(a), 42 U.S.C.A. §9659(a), the general citizen suit enforcement provision. Second, plaintiffs base federal jurisdiction on the Administrative Procedures Act, 5 U.S.C.A. §701 et seq. (APA). The APA provides, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C.A. §702. We review jurisdiction under CERCLA and under the APA separately.

1. CERCLA

Plaintiffs argue that the district court has jurisdiction over these claims under section 113(b) of CERCLA, 42 U.S.C.A. §9613(b). Section 113(b) provides: "Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy." Defendants argue that section 113(h), 42 U.S.C.A. §9613(h), removes these challenges from federal jurisdiction.[6]

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[6](h)Timing of review
No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which

Defendants argue that section 113(b) grants jurisdiction to the federal courts over controversies arising under CERCLA; that section 113(h) removes from federal jurisdiction challenges to remedial actions selected under section 104, 42 U.S.C.A. §9604; and that

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[6] is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action [sic] selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

section 113(h)(4) then restores federal jurisdiction over suits brought under section 310 once the remedial actions are taken under section 104 or secured under section 106. Defendants argue that under section 113(h)(4), no action may be brought under section 310(a) until the remedial action is actually taken.[7] We agree.

Section 113(h) clearly removes this challenge from federal jurisdiction, providing: "No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action [sic] selected" except as section 113(h)(1)-(4) provides.

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[7]Section 310 is qualified by the phrase "Except as provided in . . . section 9613(h) of this title (relating to timing of judicial review) . . . ."

Section 113(h)(4) in general addresses the timing of judicial review of EPA cleanup efforts. The plain language of the statute indicates that section 113(h)(4) applies only after a remedial action is actually completed. The section refers in the past tense to remedial actions taken under section 104 or secured under 106. Absent clear legislative intent to the contrary, this language is conclusive. See Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

The legislative history behind this section supports rather than clearly contradicts this conclusion. Judicial review is to be delayed until "all the activities set forth in the Record of Decision for the surface cleanup phase

have been completed." H. Conf. Rep. No. 962, 99th Cong., 2d Sess. 224, reprinted in 1986 U.S. Code Cong. & Admin. News 3317. See, e.g., H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 81, reprinted in 1986 U.S. Code Cong. & Admin. News 2863 ("The section [113] is intended to codify the current position of the Administrator and the Department of Justice with respect to preenforcement review: there is no right of judicial review of the Administrator's selection and implementation of response actions until after the response action [sic] have been completed . . . ."); H.R. Rep. No. 253(II), 99th Cong., 2d Sess. 22, reprinted in 1986 U.S. Code Cong. & Admin. News 3045 ("Therefore, the Judiciary Committee amendment reaffirms

that, in the absence of a government enforcement action, judicial review of the selection of a response action should generally be postponed until after the response action is taken.").

This court has already recognized that "the primary purpose of CERCLA is the prompt cleanup of hazardous waste sites." Dickerson v. Administrator, EPA, 834 F.2d 974, 978 (11th Cir. 1987) (quoting J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263, 264 (6th Cir. 1985)). Prior to the 1986 amendments that enacted section 113(h), courts uniformly held that challenges to a Record of Decision were barred before full implementation. See, e.g., Wagner Seed Co. v. Daggett, 800 F.2d 310, 314-15 (2d Cir. 1986); Lone Pine Steering Committee v. EPA, 777 F.2d

882, 886-87 (3rd Cir. 1985), cert denied, 476 U.S. 1115 (1986). Most of the courts that have addressed this issue after the 1986 amendments have reached the same conclusion. See, e.g., Frey v. Thomas, slip op. 88-948-c (S.D. Ind. December 6, 1988) ("In light of this legislative history, the Court finds that 42 U.S.C.A. §9613(h)(4) permits citizens' suits challenging EPA actions only once a remedial action or discrete phase of a remedial action has been completed."); Chemical Waste Management, Inc. v. EPA, 673 F. Supp. 1043, 1055 (D. Kan. 1987) ("the legislative history of section 113(h) establishes that it was designed to preclude piecemeal review and excessive delay of cleanup"); cf. Dickerson, 834 F.2d at 977 ("42 U.S.C.A. §9613(h)

clearly provides that federal courts do not have subject matter jurisdiction for preenforcement review of EPA removal actions pursuant to section 9604."); but see Cabot Corp. v. EPA, 677 F. Supp. 823 (E.D. Pa. 1988) (allowing preimplementation review under section 9613(h)(4). Because this challenge does not fit within section 113(h)(4), we lack jurisdiction over this challenge to the implementation of the remedial action plan under section 113(h). Plaintiffs argue that the action that caused the injury was the decision to employ an offsite remedial scheme and to solicit bids for the disposal of the toxic waste. Plaintiffs argue that this decision has already been taken, and that therefore they fit within section 113(h)(4)'s exception to

section 113(h). This argument fails, however, because plaintiffs challenge the implementation of the remedial action plan selected, not the selection of an offsite remedial action plan in general.

The district court found that section 113 does not remove this case from federal jurisdiction because of the last sentence of section 113(h)(4), which provides: "Such an action [under section 310] may not be brought with regard to a removal where a remedial action is to be taken at the site." This sentence has no bearing on whether section 113(h) applies in this case, however. Plaintiffs challenge not a removal but a remedial action. EPA has already conducted an onsite removal action. The district court seems to

read "removal" as "transportation". Compare 42 U.S.C.A. §9601(23) (removal "means the cleanup or removal of released hazardous substances from the environment") with 42 U.S.C.A. §9601(26) (defining transportation). The district court also seems to read the last sentence of section 113(h)(4) to require neutralization of the hazardous wastes prior to implementation of any offsite remedial action. That is simply incorrect.

The district court also found that a September 18, 1988, amendment to CWM's disposal contract constituted a substantial alteration of the original Record of Decision, and that that alteration required notice to the State of Alabama and an opportunity for "reconciliation" among the States of

Alabama and Texas and the EPA. The district court apparently relied on section 117(c), 42 U.S.C.A. §9617(c), which provides: "After adoption of a final remedial action plan . . . if [a subsequent remedial action] differs in any significant respects from the final plan, the President or the State shall publish an explanation of the significant differances and the reasons such changes were made." In this case, EPA and CWM increased the amount of hazardous wastes to be shipped from 36,000 tons to 47,000 tons. The plan itself remained offsite treatment and disposal. This alteration does not cause the remedial action to differ significantly from the original plan within the meaning of section 117(c). Even if this change were deemed

significant within the meaning of section 117(c), however, the only consequence would be publication of the significant differences and the reasons for the changes in a major local newspaper. See 42 U.S.C.A. §9617(d). Section 117 does not authorize private parties to halt implementation of a remedial action plan. We hold that the district court lacked jurisdiction over this action to the extent plaintiffs challenge EPA's remedial action plan.

Plaintiffs argue that this is not a challenge to the remedial action plan selected for the Geneva Industries site, and that therefore section 113(h) does not apply. Plaintiffs' complaint belies this assertion. In paragraph B of their prayer for relief, for example, plaintiffs requested a

preliminary injunction enjoining the EPA from participating in the shipment of these wastes from Texas to Alabama and in any further remedial action to be taken in connection with the Geneva Industries site. In paragraph C, plaintiffs requested a permanent injunction along the same lines. In paragraph D, plaintiffs requested the district court to reverse the EPA's selection of this remedial action plan on numerous substantive grounds. In paragraph E, plaintiffs requested a mandatory injunction compelling EPA to reopen its Record of Decision.

To the extent plaintiffs' complaint may in part be read as not challenging the remedial action plan and therefore not removed from federal jurisdiction by section 113(h), we address the

merits of plaintiffs' claims briefly. The district court held that under CERCLA, plaintiffs were entitled to notice and an opportunity to participate in the development of the Record of Decision issued regarding the Geneva Industries site. The State of Alabama argues it is an affected state within the meaning of section 104(c)(2), and therefore was entitled to notice and an opportunity to participate in the public hearings regarding the appropriate remedial action for the cleanup. The Record of Decision was issued September 18, 1986. Alabama only arguably became "affected" within the meaning of section 104 in April 1988, when CWM received the contract to dispose of these hazardous wastes at its Emelle,

Alabama, facility. See 42 U.S.C.A. §9604(c)(1) (addressing "the State or States in which the source of the release is located "). Alabama thus was not an affected state within the meaning of section 104(c)(2) at the time the EPA issued its Record of Decision. Similarly, the individual citizens of Alabama were not "interested persons" or "affected persons" within the meaning of section 113(k)(2)(B) at the time EPA issued its Record of Decision. They too only became affected or interested within the meaning of section 113(k) in April 1988.[8] To the extent plaintiffs

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[8]Naturally, both the State of Alabama and the citizens of Alabama were entitled to notice and an opportunity to participate in the decision to license CWM's Emelle, Alabama, hazardous waste treatment

challenge the EPA's cleanup under section 117(a) and (b), it is clear that EPA has complied fully with the publication and comment requirements. Consequently, we reverse the district court's grant of summary judgment and dissolve the injunction compelling the EPA to reopen its Record of Decision for thre Geneva Industries site.

2. Administrative Procedures Act

Plaintiffs argue that the district court had jurisdiction over this claim under the APA. Plaintiffs assert two separate claims under the APA. First, plaintiffs seek to compel the EPA to hold a hearing in which they can express their concerns about the

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*facility. Both received ample notice, and EPA responded to substantial public commentary during the licensing application stage.

shipment of the toxic wastes from Texas to Alabama. See 5 U.S.C.A. §706(1). Second, plaintiffs seek to have the EPA's efforts to implement the remedial action plan declared unlawful. See 5 U.S.C.A. §706(2). The APA creates a presumption that individuals can bring suit to challenge agency actions that cause legally cognizable injury. 5 U.S.C.A. §702. See generally Clarke v. Securities Industries Assn., 479 U.S. 388, 399 (1987). If Congress expressly foreclosed or postponed judicial review of these agency actions, however, then that presumption is rebutted. See 5 U.S.C.A. §701(a)(1). Congressional preclusion to judicial review is in effect a jurisdictional bar to suit. Block v. Community Nutrition Institute, 467 U.S. 340, 353 n.4 (1984). "Whether

and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Id. at 345. We have already concluded that Congress intended to remove challenges to remedial action plans from the jurisdiction of the federal courts until the remedial action has been taken. The district court thus lacked subject matter jurisdiction over the claims brought under the APA.

III. CONCLUSION

We hold that plaintiffs lack standing to challenge under the fifth amendment EPA's failure to provide them with notice and an opportunity to

participate in developing the Record of Decision in which EPA selected offsite disposal as the appropriate remedial action for the General [sic] Industries toxic waste site in South Houston, Texas. We also hold that because plaintiffs challenge a remedial action plan selected under section 104 of CERCLA, section 113(h) removes this suit from federal jurisdiction provided in section 113(b). Section 113(h)(4) does not restore federal jurisdiction until the remedial action is taken. As the legislative history indicates, Congress enacted this delay in judicial review to ensure prompt and effective permanent cleanup of hazardous waste sites that threaten human health and safety. Because that intent is clear, the APA does not provide a basis for

the exercise of federal jurisdiction. Consequently, we hold the district court lacked subject matter jurisdiction over the challenge to the remedial action plan. To the extent plaintiffs' complaint may be read as not challenging the remedial action, the district court erred in granting summary judgment to plaintiffs and ordering the EPA to reopen its Record of Decision.

The grant of preliminary injunction is REVERSED, the grant of summary judgment is REVERSED, the permanent injunction is DISSOLVED, and the case is DISMISSED for lack of subject matter jurisdiction. The challenge to the bond requirement imposed in connection with the grant of the preliminary injunction is DISMISSED as moot. We do

not address defendants' argument that venue was improper in the Middle District of Alabama under section 113(b).

No. 89-378

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

STATE OF ALABAMA, ex. rel. DON SIEGELMAN, ATTORNEY GENERAL, AND DON SIEGELMAN, INDIVIDUALLY AS A CITIZEN OF THE STATE OF ALABAMA,

Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND LEE M. THOMAS, ADMINISTRATOR OF THE ENIVRONMENTAL PROTECTION AGENCY, AND CHEMICAL WASTE MANAGEMENT, INC., AND THE STATE OF TEXAS,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals For The Eleventh Circuit

RESPONDENT STATE OF TEXAS' BRIEF IN OPPOSITION

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RESPONDENT STATE OF TEXAS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The case below was an action brought by the State of Alabama and three individuals (each of whom happened to be a state official) seeking to enjoin federal funding of a remedial action being undertaken at the Geneva Industries site in South Houston, Texas

pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§9601, et seq. (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 et seq. (1986) (SARA). The Geneva Industries site is an abandoned petrochemical plant which has been listed on the National Priorities List (NPL) as a candidate eligible for remedial action under CERCLA; it is what is commonly known as a Superfund site.

Because the remedial action chosen for the Geneva Industries site involved the disposal of PCB (polychlorinated biphenyl) contaminated soils at a commercial landfill owned by Chemical Waste Management, Inc. near Emelle, Alabama, plaintiffs below brought suit in the United States District Court for the Middle District of Alabama, alleging that EPA's failure to give notice to Alabama that the soils might be sent there violated their right to due process and the EPA's duties under CERCLA and SARA. Plaintiffs sought and obtained a temporary injunction halting the remedial action and later obtained summary judgment ordering the EPA to reopen the Geneva Industries Record of Decision (ROD) to consider Alabama's objections to the remedial action chosen.

The EPA and Chemical Waste Management and the State of Texas, both of whom had intervened, all appealed. The United States Court of Appeals for the Eleventh Circuit reversed the District Court's summary judgment, dissolved the temporary injunction, and ordered the case dismissed. *State of Alabama v. United States Environmental Protection Agency*, 871 F.2d 1548 (llth Cir. 1989). From that decision the State of Alabama and one individual, Don Siegelman, the Attorney General, have applied for a writ of certiorari.

SUMMARY OF ARGUMENT

No writ should be granted because the Court of Appeals was correct in ruling that plaintiffs below lacked standing to raise the constitutional claims they presented and in ruling that the District Court lacked jurisdiction over the statutory claims. Petitioners' lawsuit is nothing more than a taxpayer suit foreclosed by a long line of legal precedent.

REASONS THE WRIT SHOULD BE DENIED

I. THE COURT OF APPEALS WAS CORRECT IN DENYING PETITIONER SIEGELMAN STANDING TO RAISE CLAIMS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. *This is a taxpayer suit.*

Petitioner Don Siegelman, the Attorney General of Alabama, seeks a writ of certiorari in order to pursue his claim of a deprivation of his rights *as an individual* under the Due Process Clause of the United States Constitution, U.S. Const., amend. V. The rights he claims as an individual are no different than the rights of any other Alabama citizen, and, more importantly, the injuries he claims he will suffer are injuries which, as pled by Petitioner, are common to the entire citizenry of Alabama.

It bears repeating that, as Petitioner forthrightly admits, this lawsuit does not challenge the remedial action chosen for the Geneva Industries site (Petition, p. 29). What Petitioner has always challenged is federal funding of that remedy. By so doing, Petitioner has confined his suit to a taxpayer suit and doomed it to the fate of such suits.

Petitioner's claimed injuries are deprivation of "the use and enjoyment of their state resources" (Petition, p. 18). Petitioner's continued use of the *plural* possessive, despite the other plaintiffs' abandonment of further appeal, only serves to underscore the collective nature of his claimed injury. Petitioner has failed to identify how he personally will suffer the direct tangible injury necessary to confer standing. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324 (1984). Instead, he presents only a generalized grievance common to all Alabamians, and that type injury will not support standing. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483, 102 S.Ct. 752, 764 (1982).

B. *The constitutional violations Petitioner alleges are not the cause in fact of any environmental injury.*

Because the Court of Appeals liberally construed Petitioner's lawsuit to allege environmental injury upon which sufficient injury in fact to support federal court jurisdiction could be based,[1] Petitioner has recast the nature of his lawsuit to fit that mold. In doing so, he has also misunderstood the Court of Appeals finding of no "causal connection between the injury to Alabama's environment and the lack of notice and opportunity to participate in the selection of the remedial action," 871 F.2d at 1556.

Petitioner's complaint that the Court of Appeals based its decision on a "presumption that the plaintiffs would be unable to prevail even if granted their procedural rights" (Petition, p. 23) indicates a basic misunderstanding of why "Plaintiffs injury also is not

[1]The State of Texas would dispute any characterization of the pleadings below as alleging environmental injury and would maintain that plaintiffs always deliberately disclaimed any such injury.

likely to be redressed by a reopening of the Record of Decision," *id.* Contrary to Petitioner's assertion, and as a reading of the entire passage from which it is taken will make clear, the Court of Appeals did not presume that the Administrator would ignore Alabama's protestations if the Record of Decision were reopened. The Court of Appeals simply stated that so long as plaintiffs did not directly challenge the shipment of wastes from Texas to Alabama, the injury they claim is not going to be rectified.

That plaintiffs failed to show the required causal connection between the violations alleged and the injury claimed and that the threatened injury resulting from the action challenged is not likely to be redressed in a judicial action, *Allen v. Wright*, 454 U.S. at 751, 104 S.Ct. at 3324, is easily illustrated by Petitioner's continued insistence that neither Texas nor Chemical Waste Management has been enjoined from carrying out the Geneva Industries remedial action. If this were so,[2] then Petitioner would suffer the alleged injuries whether or not the Record of Decision were reopened and regardless of the Administrator's decision. Similarly, so long as the Emelle facility remains in operation, any environmental injuries complained of will continue whether or not the Geneva remedial actions were ever undertaken.[3]

By purposely avoiding any direct challenge to the active shipment and disposal of toxic wastes to Emelle, Petitioner failed to show the causal connection between the alleged violation and the alleged injury

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[2]Prior to the mandate, all Respondents acted as if it were not and that they were enjoined.

[3]It was undisputed below that the type of materials from Geneva Industries to be disposed of at Emelle were no different from the materials received there for disposal every day.

necessary to confer standing. Because plaintiffs chose to base their lawsuit on federal funding of the remedy but not to challenge the remedy directly, their own actions confined them to a taxpayer's suit.

II. THE COURT OF APPEALS CORRECTLY RULED THAT THE UNITED STATES DISTRICT COURT LACKED JURISDICTION OVER PETITIONERS' STATUTORY CLAIMS.

The Court of Appeals correctly ruled that the "Timing of review" provision of Section 113(h) of CERCLA, 42 U.S.C. §9613(h), restricts federal court jurisdiction to review challenges to remedial actions until after that action has been taken. This is clear, as the Court of Appeals held, both from the language of the statute itself and from its legislative history, 871 F.2d at 1557.

Contrary to Petitioners' assertions, Section 113(h) is meant to preclude judicial review from more than just potentially responsible parties (PRP's) before the remedial action is taken. It is also intended to prevent citizen challenges such as this one. That is obvious from both the specific reference in Section 113(h)(4) to citizen suits for review of remedial actions, 42 U.S.C. §9613(h)(4), and from the separate codification of the pre-SARA case law proscribing pre-enforcement review in Section 113(h)(1), 42 U.S.C. §9613(h)(1). See also 871 F.2d at 1558 (citing cases).

Petitioners' argument that such construction effectively precludes them from ever obtaining judicial review only further demonstrates that the Geneva Industries remedial action will not cause environmental or any other harm to Petitioners. If the remedial action were to cause any such harm to Petitioners, it could be addressed in a suit for judicial review *after* the action has been taken. Petitioners'

insistence that the present suit is their only vehicle through which their injuries can be addressed (Petition, p. 33) demonstrates that it is not environmental injuries of which they complain and that it is not the remedial action which will cause them injury.

In the hue and cry of Petitioners' insistence that they will irreparably suffer the loss of their right to judicial review if they cannot obtain it now, it must be remembered that judicial review of administrative action is not an inherent right, and except where the Constitution requires it, may be granted or withheld as Congress chooses. *Estep v. United States*, 327 U.S. 114, 120, 66 S.Ct. 423, 426 (1946). While the Administrative Procedure Act, 5 U.S.C. §702, generally grants such a right, see *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1510 (1967) (citing cases), it can be restricted by Congress. Congress has clearly done so here, and if Petitioners must suffer a wrong without a remedy it is because Congress specifically chose not to avail them one.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

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No. 89-378

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF ALABAMA, EX REL. DON SIEGELMAN, ATTORNEY GENERAL OF ALABAMA, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a citizen of Alabama had standing to challenge the failure of the EPA to give him or the State of Alabama notice of a decision to utilize off-site disposal of wastes as part of a cleanup taking place in Texas under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), because the contractor selected by the State of Texas to perform the cleanup elected to ship the wastes to a licensed facility in Alabama.

2. Whether Section 113(h) of CERCLA, 42 U.S.C. 9613(h) (Supp. V 1987), bars a challenge to a decision to use a particular method of disposal at a site until after the remedial action at the site is completed, and, if so, whether such deferral of review denies due process of law.

3. Whether the court of appeals properly dismissed petitioners' challenge to the district court's imposition of a bond.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-92a) is reported at 871 F.2d 1548. The opinions of the district court granting a temporary restraining order (Pet. App. 1a-21a), a preliminary injunction (Pet. App. 22a-25a), and partial summary judgment (Pet. App. 26a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1989. A petition for rehearing was denied on June 7, 1989. The petition for a writ of certiorari was filed on September 1, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Geneva Industries site, located in Houston, Texas, is an abandoned refinery which manufactured a variety of organic compounds, including polychlorinated biphenyls (PCBs), from 1967 through 1978. Plant operations were marked by numerous spills of PCBs; after investigation, EPA concluded that the PCB contamination of the site presented a continuing risk to persons living around it. ROD 1-10.[1] After considering comments submitted in response to a rulemaking proceeding on potential hazards associated with the site, EPA added the Geneva Industries site to the National Priorities List (NPL) of sites that appear to warrant remedial action under CERCLA (49 Fed. Reg. 37,083 (1984)); the site is currently assigned a priority ranking of 37 out of approximately 800 NPL sites. 40 CFR Pt. 300, App. B.

In January of 1984, EPA entered into a cooperative agreement with the Texas Water Commission (TWC) under which the TWC would be the lead agency for CERCLA actions at the Geneva site. The TWC performed a Remedial Investigation of the site, and then conducted a Feasibility Study in order to determine what actions would be appropriate as part of a permanent remedy. Pet. App. 42a-43a. The Feasibility Study, which described alternative environmentally safe procedures for cleanup (including groundwater treatment and the excavation and disposal of contaminated soils), was released for public review and comment in May 1986. Three options for disposal were put before the public for comment: on-site incineration, off-site incineration, and off-site land disposal. During the public comment period, which lasted from May 3 through

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[1] We are lodging a copy of the Record of Decision (ROD) with the Clerk of this Court.

June 10, 1986, EPA held a public meeting in South Houston. *Id.* at 43a, ROD 20.

After evaluating the merits of the various alternatives for disposal of the excavated soils and considering the public comments, EPA issued the Record of Decision (ROD) for the Geneva site on September 18, 1986. The ROD explained EPA's determination that the disposal option of off-site land disposal was the most cost effective of the various acceptble disposal options. In accordance with EPA's usual practice, no specific disposal facility was identified or selected in the ROD for the Geneva site. Pet. App. 43a, 51a-52a; ROD 21.

In November 1987, TWC solicited bids for the removal of PCB solids from the Geneva site. In compliance with federal procurement guidelines, 40 C.F.R. 33.205-33.605, Subpt. B, TWC selected the lowest responsive and responsible bid—the one submitted by Chemical Waste Management, Inc. (CWM). As part of its cleanup activities, CWM proposed to use its federally and state approved toxic waste treatment facility in Emelle, Alabama, to receive the excavated soils. In a May 24, 1988, press release, TWC announced that CWM was the cleanup contractor and had authorization to begin cleanup and disposal operations. Attachments to Federal Defendant's Opposition, Civ. Action No. 88-V-987-N (Defendant's Opp.), at Attachment 7; Pet. App. 51a-52a.

Although no special notice that CWM planned to use its Emelle facility was given to Alabama at this time, EPA did consult with the State before the contaminated soil was sent to the Emelle facility. Governor Guy Hunt and petitioner Attorney General Siegelman informed EPA of their concerns in correspondence of June and July 1988; in addition, on July 8, 1988, Siegelman sent EPA a notice of intent to sue. Defendant's Opp., at Attachment 2. Nevertheless, after meeting with Alabama officials the EPA Administrator concluded on August 5, 1988, that the remedy had been prop-

erly selected and that the Emelle waste treatment facility was an appropriate disposal site for the Geneva Industries contaminated soil. Pet. App. 52a-53a. On September 29, 1988, EPA notified Alabama that the shipments would begin in early October (*id.* at 6a).

On September 28, 1988, the complaint in this action was filed on behalf of the State of Alabama and individual plaintiffs Hunt, Siegelman and Pegues (the Director of the Alabama Department of Environmental Management).[2] It alleged that EPA had failed to perform nondiscretionary duties to consult with Alabama before deciding on a remedy at the Geneva site and to choose a remedy for the Geneva site other than off-site disposal. The complaint did not allege that wastes from the Geneva site differ in any respect from other wastes regularly disposed of at Emelle by CWM, or that disposal of the Geneva wastes at Emelle would cause environmental harm. It claimed instead that "[t]he availability of Alabama's existing hazardous waste landfill capacity, required for use by this State for the present and future disposal of its own waste, will be restricted and diminished," and that "[t]he time, energy and resources of Alabama State agencies and employees responsible for the protection of Alabama's environment will be diverted and broadened" if the Geneva site waste is shipped to Emelle. Complaint 13.

The district court granted petitioners' motion for a temporary restraining order prohibiting transportation of the Geneva site wastes (Pet. App. 1a). The court rejected arguments by EPA and intervenors Texas and CWM that Section 113(h) of CERCLA, 42 U.S.C. 9613(h), precluded review of this challenge to a remedial action under that statute (Pet. App. 12a-13a). The court held that Alabama was an "affected State" entitled to consultation before EPA "determin[es] any appropriate remedial action to be taken," within the terms of CERCLA Section 104(c)(2), 42 U.S.C.

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[2] Jurisdiction was asserted under, inter alia, the citizen suit provision of CERCLA, Section 310, 42 U.S.C. 9659 (Supp. V 1987).

9604(c)(2) (Pet. App. 10a-11a). The court also ruled that petitioners had been denied their constitutional right to due process of law because no specific notice or opportunity to be heard was provided them prior to issuance of the September 18, 1986, ROD on the Geneva site (*id.* at 17a).

Based on its earlier opinion, the district court subsequently entered a preliminary injunction enjoining EPA and "all persons in active concert or participation with [EPA]" from authorizing, engaging in, or funding the remedial action set out in the Geneva site ROD, or facilitating the transportation of Geneva site waste to Alabama (Pet. App. 22a-24a). The order required petitioners to post bond for security in the amount of $564,970.00, for any costs and damages proximately resulting from any wrongful restraint or injunction (*id.* at 20a, 25a). The court thereafter granted partial summary judgment to petitioners; it granted their request for a permanent injunction and ordered EPA to reopen its ROD for the Geneva site. The district court then dismissed the remainder of the case (*id.* at 26a-29a).

On appeal by respondents, the court of appeals reversed the grant of partial summary judgment, dissolved the injunction and dismissed the case for lack of subject matter jurisdiction (Pet. App. 91a). Petitioners' challenge to the bond requirement was dismissed as moot (*ibid.*).

The court of appeals first held that the State lacked standing to raise the due process challenge, since States are not persons within the meaning of the Fifth Amendment (Pet. App. 59a, citing *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966)). It ruled that the individual petitioners also lacked standing to raise the constitutional issue because they had not suffered any specific injury resulting from their lack of participation in the development of the Geneva Industries ROD (Pet. App. 66a-68a).

The court of appeals next held that the district court had no jurisdiction over the claimed statutory violations because

Section 113(h) of CERCLA withholds jurisdiction to review challenges to a CERCLA remedial action until after the action is "taken" or "secured," and in this case the remedial action at the Geneva site was not yet completed (Pet. App. 73a-84a). In addition, the court of appeals considered the merits of petitioners' statutory claims and found that they rested on incorrect readings of CERCLA (*id.* at 84a-87a). In particular, the court concluded that Alabama was not an "affected State" for purposes of Section 104(c)(2) (requiring consultation before determination of remedial action), and that the individual plaintiffs were not "affected persons" within the meaning of Section 113(k)(2)(B), because EPA only chose the type of remedy—it did not decide where the wastes would ultimately be buried.

A timely petition for rehearing was denied on June 7, 1989, and the mandate issued that same day. Petitioners' motion to recall the mandate was denied by the court of appeals on July 25, 1989.[3]

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[3] Petitioners made no further effort to enjoin the shipment of wastes from the Geneva site to the Emelle facility. Shipments commenced in July of this year, we are informed by EPA that this phase of the remedial action at the Geneva site has now been completed. The request for injunctive relief against EPA's support of these shipments is accordingly now moot. The case as a whole can thus be saved from mootness only by the remaining possibility of recovery on the bond required in connection with the issuance of the preliminary injunction, which survived the appellate court's dissolution of the premanent injunction issued by the district court. Cf. *University of Texas* v. *Camenisch*, 451 U.S. 390, 396 (1981) (noting that issues preserved by injunctive bond do not survive when case is mooted on appeal of a preliminary injunction, but do survive when mootness occurs on appeal from issuance of final injunction, and distinguishing *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 305-306 (1964), as involving a permanent, rather than a preliminary, injunction).

In any event, the case was not moot when it was decided by the court of appeals. For that reason, and because—as we explain below—there

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The court of appeals ruled that neither Alabama nor the individual plaintiffs had standing to claim that it was unconstitutional for EPA to decide on a remedy for the Geneva site without first providing them with specific notice and an opportunity to comment. Petitioners tacitly concede (Pet. 16 n.2) that petitioner Alabama lacks standing (see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966)); petitioner Don Siegelman simply challenges the court's ruling that the individual plaintiffs lack standing. The ruling below is clearly correct, however, since the three individual plaintiffs failed to allege that they were personally threatened with any concrete injury; they alleged instead only generalized grievances regarding the conduct of a government program.

As the court of appeals pointed out, the individual plaintiffs failed to show that they "personally [have] suffered some actual or threatened injury" (Pet. App. 62a, quoting *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979)), and also failed to show that any purported injury to them resulted from EPA's failure to give specific notice to Alabama (Pet. App. 66a).[4] The injury claimed by peti-

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are no reasons that would in any circumstances warrant further review of that decision by this Court, certiorari should be denied regardless of whether the case is now moot. Compare *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978), with *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). See R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 288, 722-723 & n. 28 (6th ed 1986).

[4] It is, in any event, far from clear that petitioner Siegelman has standing to object to the failure to give notice to the State. Instead, his claim would appear to be limited to the failure to give him notice as an individual citizen of the State.

tioner Siegelman is to an alleged "quantifiable property interest in the use and enjoyment of * * * state resources," specifically "state revenues," and "the safety, integrity, and conditions of Alabama's highways," landfill capacity within Alabama, and the "time and energy" of state employees (Pet. 18-20). But Siegelman has never attempted to show that he *personally* suffered some injury as a result of EPA's conduct (*Valley Forge Christian College* v. *Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)) or that he has any kind of "direct stake in the outcome," (*Sierra Club* v. *Morton*, 405 U.S. 727, 740 (1972)). Neither Siegelman nor the other individual plaintiffs alleged that they would be "affected in any of their activities or pastimes" by the shipment of wastes to the Emelle facility, or that they used the area around the facility or the highways leading to it "in any way that would be significantly affected by the proposed actions" (*Sierra Club*, 405 U.S. at 735). Siegelman's concern that EPA's actions will result in the expenditure of state resources and the use of state highways is one shared by all citizens of Alabama, and indeed by citizens of all States in which there are facilities that might have become the recipient of the Geneva site wastes. Petitioner Siegelman's generalized interest that EPA not violate the Fifth Amendment does not provide " 'that concrete adverseness . . . upon which the court so largely depends for illumination of difficult constitutional questions.' " *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 224 (1974) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). The court of appeals was accordingly correct in finding that standing was lacking.

Even if Siegelman had pleaded a concrete injury, the causal link with the allegedly illegal agency action is too attenuated to support standing, as the court of appeals also found (Pet. App. 66a-68a). As the court noted (*ibid.*), petitioners did not challenge TWC's award of the contract to

CWM, nor did they challenge CWM's right to continue to dispose of PCBs at its Emelle facility pursuant to both state and federal approvals. Siegelman's "injury," therefore, is not fairly traceable to *EPA's* allegedly improper conduct since waste may continue to be shipped from Texas to Emelle even without EPA participation. See *Simon* v. *Eastern Kentucy Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

2. Both petitioners contest the court of appeals' holding that Section 113(h) of CERCLA, 42 U.S.C. 9613(h), bars their statutory claims until the remedial action at the Geneva site is complete. That Section was added to the statute by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, and essentially codified a line of decisions holding that judicial review of EPA response actions under CERCLA is barred until after the a cleanup is completed. See *Dickerson* v. *Administrator, EPA*, 834 F.2d 974, 977-978 (11th Cir. 1987); *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d 383 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986); *United States* v. *Outboard Marine Corp.*, 789 F.2d 497, 505-506 (7th Cir.), cert. denied, 479 U.S. 961 (1986); *Wheaton Industries* v. *EPA*, 781 F.2d 354 (3d Cir. 1986); *Lone Pine Steering Committee* v. *EPA*, 777 F.2d 882, 886-887 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986); *J.V. Peters & Co.* v. *EPA*, 767 F.2d 263 (6th Cir. 1985). Section 113(h) bars federal court jurisdiction over "any challenges to removal or remedial action selected," and goes on to authorize jurisdiction in several limited instances, including where a citizen suit alleges "that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter." As the court below noted (Pet. App. 75a-77a), the plain language of this provision, as well as its clear legislative history, compels the conclusion that judicial review must be deferred until after the

remedial action in question has been "taken" or "secured." As the court below also pointed out (*id.* at 83a-84a), petitioners cannot escape the force of this provision by claiming that their suit is not a challenge to a remedial action. Their complaint specifically asked the district court to void EPA's remedy decision for the Geneva site and require EPA to reopen the matter for further consideration after consultation with Alabama (*id.* at 84a).

Petitioners contend (Pet. 30-34) that Section 113(h) should apply only to plaintiffs who are attempting to litigate their liability for the costs of cleanup, not to plaintiffs who challenge a cleanup in order to prevent environmental harm. That argument finds no support in the language of the statute, which defers "any challenges" to remedial actions. Further, the argument is specifically refuted by the legislative history. See, *e.g.*, 132 Cong. Rec. H9583 (daily ed. Oct. 8, 1986) ("[c]learly the conferees did not intend to allow any plaintiff, whether the neighbor who is unhappy about the construction of a toxic waste incinerator in the neighborhood, or the potentially responsible party who will have to pay for its construction, to stop a cleanup by what would undoubtedly be a prolonged legal battle") (remarks of Rep. Glickman). Petitioners rely on dicta in a single district court opinion. *Cabot Corp.* v. *EPA*, 677 F. Supp. 823, 829 n.6 (E.D. Pa. 1988).[5] Subsequent cases have rejected the *Cabot* court's suggestion that Section 113(h) might not apply to citizen suits alleging irreparable harm, recognizing that the suggestion is inconsistent with Congress's intent to defer

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[5] *Chemical Waste Management, Inc.* v. *EPA*, 673 F. Supp. 1043 (D. Kan. 1987), also cited by petitioners (Pet. 33), did not involve a challenge to a remedial action. See, *e.g.*, 673 F. Supp. at 1055 ("[b]ecause plaintiffs are not attempting to delay a cleanup, the court believes that their legal action is expressly preserved"). See *South Macomb Disposal Authority* v. *EPA*, 681 F. Supp. 1244, 1249 n.4 (E.D. Mich. 1988) (distinguishing *Chemical Waste Management*).

all suits which could delay CERCLA cleanup actions. *Neighborhood Toxic Cleanup Emergency* v. *Reilly*, 716 F. Supp. 828, 832-834 (D. N.J. 1989); *Frey* v. *EPA*, 28 Env't Rep. Cas. (BNA) 1660, 1664 (S.D. Ind. 1988); see also *Jefferson County* v. *United States*, 644 F. Supp. 178, 181-182 (E.D. Mo. 1986) (pre-SARA case finding that challenges to CERCLA remedial actions by citizens alleging irreparable harm are barred); see generally *In re Combustion Equipment Assocs., Inc.*, 838 F.2d 35, 37 (2d Cir. 1988) ("Congress amended CERCLA in 1986 to make clear that the statute precluded preenforcement judicial review"); *Dickerson* v. *Administrator*, 834 F.2d 974, 978 (11th Cir. 1987) ("[Section 113(h)] reflects Congress' intent to preclude preenforcement judicial review and is consistent with earlier cases barring such review.").

In any event, the court of appeals specifically addressed the merits of petitioners' claims and found (Pet. App. 84a-87a) that EPA had complied with the statute. Petitioners do not quarrel with this alternative holding. Thus, even if the court below misread the scope of Section 113(h), the judgment would have to be affirmed on this alternative ground.

Petitioners' suggestion (Pet. 34) that Section 113(h) may be unconstitutional insofar as it "preclude[s] judicial review of legitimate constitutional claims" is unwarranted. First, as shown pp. 7-9, *supra*, petitioners lacked standing to bring their constitutional claim. In any event, Section 113(h) does not preclude review, but only delays it until after remedial action has been taken, and thus is clearly constitutional. See *South Macomb Disposal Authority* v. *EPA*, 681 F. Supp. 1244, 1251-1252 (E.D. Mich. 1988).

3. In the district court, Texas and CWM, as well as EPA, requested that petitioners be required to post a bond. The district court required petitioners to post a bond in the amount of $564,970, without specifying whether the bond

ran in favor of Texas and CWM in addition to EPA (Pet. App. 25a). Petitioners' cross-appeal assumed that the bond ran in favor of Texas and CWM, and argued that this was improper because those parties (unlike EPA) were not specifically enjoined by the preliminary injunction. Respondents pointed out, inter alia, that the issue was not ripe; whether or not the bond runs in favor of Texas and CWM, and if so whether that is proper, can be sorted out if and when there is an effort to collect on the bond. The court of appeals stated, without explanation, that petitioners' challenge to the bond requirement was "moot" (*id.* at 91a). Perhaps the court of appeals meant that the challenge was premature, but used the wrong label. It nevertheless seems clear that petitioners would not be barred from making their argument should Texas or CWM proceed against them. That appears to be all that petitioners are seeking at this point (Pet. 36). Since it is, in any event, speculative whether that question will arise in further proceedings, and how it will be resolved if it does, it is not suitable for presentation to this Court at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND LEE M. THOMAS, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, AND CHEMICAL WASTE MANAGEMENT, INC., AND THE STATE OF TEXAS,
Respondents.

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RESPONDENT CHEMICAL WASTE MANAGEMENT, INC.'S BRIEF IN OPPOSITION

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RESPONDENT CHEMICAL WASTE MANAGEMENT, INC.'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The respondent Chemical Waste Management, Inc. ("CWM"), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 871 F.2d 1548.

a. **Respondent's Statement Of The Facts.**

Geneva Industries is an abandoned refinery in a highly urbanized area near Houston, Texas. (Defendants' Exhibit 3, at 1.) Thirty-five thousand people live within one mile of the site, and the closest residences are only fifty feet from the boundary. (Def. Exh. 3.) EPA identified the site for attention on the National Priorities List almost five years ago, ranking it as a site warranting immediate remedial action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 *et seq.* *See* 49 Fed. Reg. 37,083 (Sept. 21, 1984). Nearly three years ago, after following all applicable policies and procedures,[1] including consultation with the State of Texas and notification to and opportunity to comment for the people residing near the contaminated area, EPA decided that the site should be cleaned up by excavating and removing PCB-containing soil to a secure, off-site disposal facility. (*See* Def. Exh. 3.) No specific disposal facility was selected by EPA. Rather, EPA merely decided the site should be cleaned up by excavation and disposal at a permitted, secure off-site landfill; it did not decide which landfill. (Petition, Appendix, p. 51a).

The Texas Water Commission ("TWC"), not EPA, was the lead agency on the cleanup. TWC had the responsibility to define the technical scope and specifications of the cleanup. Therefore, after EPA made the general decision to clean up

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[1]Under CERCLA, EPA first consults with the State within which the site is located to determine whether EPA or the State will be the lead agency for the cleanup. In the instant case, Texas, through the Texas Water Commission ("TWC") became the lead agency. The first step is then the "Remedial Investigation" ("RI") of the site, usually accomplished under contract with the lead agency. After the RI, a "Feasibility Study" ("FS") is conducted for the site in order to determine what actions would be appropriate to remedy or minimize the hazard at the site. This "RI/FS" process sets forth the various options available, addresses their cost-effectiveness, and identifies ones which provide protection for human health and the environment. EPA then undertakes to evaluate the options, and releases the FS for public review. After public comment, EPA issues a Record of Decision ("ROD") for the site in question indicating EPA's determination of which option for remediation is selected. The ROD in the instant case was issued September 18, 1986, indicating EPA's selection of off-site disposal at a permitted landfill as the favored alternative. (Def. Exh. 3.)

the site by excavation and removal, TWC prepared project specifications and followed the time-consuming government contracting process[2] that had to precede implementation of EPA's remedial decision and actual cleanup of the health threat faced by Houston's residents. CWM was the successful bidder to conduct the cleanup, proposing to use its permitted Emelle, Alabama facility as the site for ultimate disposal.

1. *The Geneva Industries Record of Decision and Its Implementation.*

The remedy selected for the Geneva site includes excavation of PCB-containing drums and soils and their transport to a secure, permitted off-site landfill. This remedy was selected only after EPA and TWC completed a thorough review of alternative disposal options. (*See* Record of Decision, Def. Exh. 3.)

CERCLA's purpose is to remediate health threats posed by the release or potential release of hazardous substances to the environment. EPA's policy under CERCLA is to select remedial action that meets applicable or relevant and appropriate federal environmental and public health requirements. In selecting the Geneva remedy, EPA considered whether the identified alternatives were consistent with applicable statutes and EPA's CERCLA regulations, which are set forth in the National Contingency Plan ("NCP"). (*See* 40 C.F.R. Part 300.)

The CERCLA process also requires public participation in the decision making on a remedial action. The obvious focus of this participation requirement is the local population,

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[2]TWC followed federal procurement guidelines in soliciting and reviewing bids for the Geneva site contract. An advertisement for bids was published in the local *Texas Register* on January 8, 1988; a national advertisement was circulated for three weeks in the *Commerce Business Daily* of the U.S. Department of Commerce beginning January 4, 1988. Affidavit of Robert I. Chapin. (Doc. Rec. No. 17.) TWC selected the lowest responsive bid, which was submitted by CWM. In addition to being the on-site contractor, CWM proposed to use its own permitted disposal facility at Emelle, Alabama as the primary disposal site. TWC and CWM entered a contract for the remedial action on April 18, 1988. EPA is not a party to that agreement. Affidavit of John Meachum. (Doc. Rec. No. 17.)

which is threatened by the release of hazardous substances; has a direct interest in assuring that the remedy selected will adequately address that threat; and, unlike the population surrounding a permitted disposal facility, has no other forum in which to air their concerns. EPA considered all public comments as required by CERCLA and its regulations.[3] In fact, EPA went so far as to reevaluate its decision based upon after-the-fact comments by Alabama legislators. While not required, EPA went out of its way to allow for public participation, and participation by the plaintiffs below.

EPA and TWC considered three disposal options for the Geneva soil: off-site land disposal, on-site incineration and off-site incineration. The agencies determined that all three options were equally protective of human health and the environment and, thus, chose the most cost-effective remedy — off-site land disposal.

Off-site incineration was rejected because it offered no greater protection; cost more than twice as much as off-site land disposal; and may have been impracticable due to the scarcity of facilities. Only three incinerators approved for burning PCBs then existed and all were operating very close to full capacity. (*See* Def. Exh. 3, at 23.)

Similarly, on-site incineration was ruled out because it provided no greater environmental protection and cost about 40 percent more than land disposal. This option also provoked substantial public anxiety because the Geneva site is located in an urban area. Approximately 35,000 persons live within one mile of the site, with the nearest homes less than 50 feet from the site's boundaries. (Def. Exh. 3, at 22-23.)

Once EPA signed the Record of Decision, which did not specify any particular off-site disposal facility, implementation of the remedy was TWC's responsibility. The Texas

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[3]These regulations, which do not provide for notice and comment by States that may ultimately receive CERCLA cleanup wastes, have themselves been the subject of notice and public comment. *See, e.g.*, 47 Fed. Reg. 10972 (March 12, 1982); 47 Fed. Reg. 31180 (July 16, 1982).

agency prepared detailed specifications for excavation and disposal of the Geneva soils and solicited contract proposals. Along with other bidders, CWM submitted a proposal for disposal at the Emelle facility. Following a protracted government contracting process, TWC awarded the contract to CWM. The contract itself specifies that while EPA grant monies are partially funding the project, neither the United States nor EPA is a party to the contract. Meachum Aff., Exh. B (Doc. Rec. No. 15).

2. *The Emelle Facility.*

The CWM Emelle facility receives hazardous and PCB wastes, some of these being every day. These wastes are placed in disposal cells that EPA and the State have determined are properly engineered. In addition, as the EPA Administrator stated in his letter to Alabama Senator Richard Shelby, the facility enjoys a unique hydrogeologic setting that provides unparalleled natural containment for a landfill. (Doc. Rec. No. 17.)

As the nation's largest landfill, the Emelle facility is well able to dispose of the Geneva soil. The Geneva cleanup will use less than 1.2 percent of the facility's existing federally approved PCB disposal capacity. *See* Affidavit of Dr. Rodger Henson ¶ 5 ("Henson Aff.") (Doc. Rec. No. 15).

The Emelle facility is subject to comprehensive regulation by EPA and the Alabama Department of Environmental Management ("ADEM"). The facility is one of only nine landfills in the country that are authorized to treat, store and dispose of PCBs, and one of only a handful with sufficient capacity for the Geneva soil. CWM's handling of PCBs is governed by approval letters and regulations (*see* 40 C.F.R. Part 761) issued by EPA under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601 *et seq.*, dating back to 1978.

The facility's PCB approvals rest on EPA's finding that, due to the site's hydrogeologic setting, landfill design and operating procedures, the disposal of PCB wastes such as those at the Geneva site does not present an unreasonable risk of injury to human health or the environment. For this

reason, EPA has approved the Emelle facility to dispose of PCBs in concentrations at levels greater than those found in the Geneva soils. *See* Henson Aff., Exhs. 1 & 3 (Doc. Rec. No. 15). In addition, in December 1984, EPA, CWM and the State of Alabama entered a Consent Agreement, which authorizes the Emelle facility to store and dispose of PCBs. (*See* Def. Exh. 2.)

EPA also regulates CWM's handling of other hazardous waste through a final permit issued under section 3005 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, on May 27, 1987 and effective on July 11, 1988. Prior to issuance of the final permit, CWM operated the facility under "interim status" in accordance with RCRA. CWM's hazardous waste operations are also regulated by ADEM through the Alabama Hazardous Waste Management Act. *See Ala. Code* §§ 22-30-1 *et seq.* (1975). ADEM proposed a draft hazardous waste permit for the facility in September, 1986 but has not yet issued a final permit. Until that permit is issued, CWM is authorized to operate under state "interim status" in accordance with ADEM's regulations at Rule 335-14-8-.07, ADEM Administrative Code.

Under both RCRA and TSCA, as well as state law, CWM is authorized to handle a broad range of hazardous wastes and PCBs. That authorization is general, not specific. CWM is authorized, for example, to dispose of *any* soil containing PCBs, such as the Geneva soil, regardless of its source and without any requirement for specific regulatory authorization for particular shipments.

3. *Public Participation in EPA Decisionmaking Regarding Waste Handling at the Emelle Facility.*

Petitioner and the citizens of Alabama have had numerous opportunities for input into EPA's decisionmaking regarding the receipt of waste, such as the Geneva soil, at the Emelle facility. In fact, they have been given the opportunity to comment on whether the Emelle facility should be allowed to landfill PCBs exactly like those to be shipped from the

Geneva site. In May 1978, when EPA considered the initial application from the facility for approval under TSCA to landfill PCBs, EPA provided notice of the application and solicited public comment through local newspapers. *See* Henson Aff., Exh. 1 (Doc. Rec. No. 15). No comments were received from the public; indeed the State of Alabama *recommended* that EPA approve the site for PCB disposal. *Id.*

More recently, in 1985, ADEM received notice of both CWM's application and EPA's TSCA approval for use of the Emelle facility's Trench 21 for PCBs. *Id.*, Exhs. 2 & 3. EPA's action, and its underlying finding that PCB disposal at Emelle poses no threat to human health and the environment, were reviewable in federal court under the Administrative Procedure Act. Nevertheless, neither ADEM nor any of the plaintiffs below took any action to oppose EPA's grant of TSCA approval to dispose of PCBs in Trench 21, including PCB soil such as that from the Geneva site.

In addition, since September 1986 when EPA proposed a draft RCRA permit for the Emelle facility, issues regarding disposal of hazardous waste have been fully and publicly aired in the permitting proceeding. In that proceeding EPA, jointly with ADEM, provided extensive opportunities for the citizens of Alabama to review and comment on CWM's permit application and draft federal and state permits. The agencies provided twice the time for public comment prescribed in EPA's RCRA regulations. (*See* 40 C.F.R. §§ 124.10-124.14.) They held a public information meeting and a 7½-hour public hearing in Livingston, Alabama near the Emelle facility. In all, EPA received 78 oral statements and 145 written comments on the draft RCRA permit. Indeed, the first oral statement at that hearing was that of the petitioner, Alabama Attorney General Siegelman. The Emelle facility's extensive role in the national effort under CERCLA to clean up abandoned hazardous waste sites was freely discussed in this process.

Upon issuance of that permit in May 1987, the State and some Alabama citizens petitioned the EPA Administrator for review of the permit decision. In May 1988, the Administrator granted partial review and, at his direction, EPA

Region IV subsequently modified several permit conditions. As to the remaining issues, the State and citizens groups have filed petitions for review, which are now pending before the Eleventh Circuit. (Dkt. Nos. 88-7523 & 88-7528.)

b. **The Proceedings Below.**

On September 28, 1988, petitioner the State of Alabama *ex rel.* Don Siegelman, Attorney General, along with individuals Guy Hunt (the Governor of Alabama), Don Siegelman (the Attorney General), and Leigh Pegues (the Director of the Alabama Department of Environmental Management) filed an action in the United States District Court for the Middle District of Alabama against the U.S. Environmental Protection Agency and its then Administrator, Lee Thomas, seeking an injunction to halt the ongoing cleanup of the Geneva site, and thereby to stop the interstate shipment of some 47,000 tons of soil contaminated with PCBs from the Geneva site to the disposal facility at Emelle, Alabama operated by CWM which has been permitted by EPA, upon the State of Alabama's recommendation, as safe for disposal of PCBs.

On October 3, 1988, the plaintiffs below filed a motion for a temporary restraining order to halt the cleanup in Texas and to stop the interstate transportation of the PCB-contaminated soil to Alabama. On October 4, 1988, CWM filed a motion for leave to intervene as a defendant; on October 12, 1988, the State of Texas also filed a motion to intervene as a defendant. These motions were granted by the district court on October 20, 1988.

On October 21, 1988, the district court issued a temporary restraining order, accompanied by a written memorandum opinion. (Petition, Appendix, p. 1a.) On October 31, 1988, the district court, after requiring the plaintiffs to post a bond in the amount of $564,970.00, entered a preliminary injunction based, in part, on the judge's own belief that the definition of hazardous waste was sufficient to demonstrate environmental harm, even though the plaintiffs did not allege any. The judge thereby prohibited the continuation of

any cleanup activity at the Geneva site or the expenditure of any federal funds in furtherance of the cleanup.

On November 1, 1988, the State of Texas and CWM filed a joint notice of appeal, and, on November 2, filed with the Court of Appeals for the Eleventh Circuit a joint motion to expedite the appeal. Defendants EPA and Lee Thomas filed a separate notice of appeal on November 3, 1988, and also filed a motion to expedite the appeal. The motions to expedite were granted. On November 4, 1988, the plaintiffs filed a cross appeal on the issue of the requirement of a bond.

Prior to the Eleventh Circuit's consideration of the appeal, the district court granted partial summary judgment to the plaintiffs, ordered EPA to reopen its Record of Decision for the Geneva site, and dismissed the remainder of the case.

On April 18, 1989, the Eleventh Circuit reversed the district court's grant of preliminary injunction and partial summary judgment, dissolved the permanent injunction, and dismissed the case for lack of subject matter jurisdiction. The court also dismissed as moot the plaintiffs' challenge to the requirement of a bond which had been imposed by the district judge. (Petition, Appendix, p. 91a.)

On June 7, 1989, the Eleventh Circuit denied the appellees/cross-appellants' (petitioners herein) petition for rehearing. This petition followed.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied by this Court because the Court of Appeals for the Eleventh Circuit correctly ruled that the petitioner lacked standing to raise the constitutional claims. In addition, the Court of Appeals was correct in finding that the district court lacked jurisdiction over the petitioner's statutory claim. Finally, no other overriding reason exists for this Court to grant the writ.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CORRECTLY HELD THAT PETITIONER DOES NOT HAVE STANDING UNDER THE FIFTH AMENDMENT TO CHALLENGE A CERCLA REMEDIAL ACTION PLAN.

A. *The Petitioner Lacks Standing Because He Has No Injury-in-Fact.*

The Court of Appeals for the Eleventh Circuit held that petitioner lacks standing to pursue his constitutional claims. (871 F.2d at 1554-56; Petition, Appendix, pp. 58a-68a.) Petitioner challenges the court's finding, claiming the Eleventh Circuit "misapprehended the nature of the constitutional claims advanced on behalf of the individual plaintiffs." (Petition, p. 17.) Petitioner insists, "This is not a taxpayers' suit," (Petition, p. 18) but rather a case attacking "governmental action which deprives [petitioner] of his property and liberty without due process of law." (Petition, p. 18.)[4]

The law requires that in order to have standing to assert his constitutional claims a plaintiff must present at a minimum a "case or controversy" as mandated under Article III. This Court has held that requirement to mean that the plaintiff himself must suffer actual or threatened injury which directly results from the challenged activities and which is capable of redress by judicial action. *Warth v. Seldin,* 422 U.S. 490, 499 (1975). In addition, the plaintiff's injury must be personal, and not some generalized grievance concerning actions or conduct taken by government. *United States v. Richardson,* 418 U.S. 166, 174-75 (1974). Generalized grievances concerning government's conduct are left for consideration by the representative branches of government. *Allen v. Wright,* 468 U.S. 737, 751 (1984); *Valley Forge*

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[4]It is axiomatic that States are not "persons" within the meaning of the Due Process Clause. *South Carolina v. Katzenbach,* 383 U.S. 301, 324 (1966). Petitioner therefore does not assert the constitutional claims, as he did below, on behalf of the State.

Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982).

In the present case, the individual petitioner asserts that he, along with the other individual plaintiffs below who chose not to pursue this action further, possess a property interest in the use and enjoyment of the State's resources and that the defendants have deprived them of that use and enjoyment without due process of law. (Petition, pp. 18-19.) The petitioner asserts two specific injuries. First, petitioner claims that additional State expenditures and resources will be required to ensure safety along the State's highways due to trucks carrying waste from the Geneva site to the Emelle facility. (Petition, pp. 19-20.) Even assuming the alleged injury is real, the petitioner's claims arise from his status as a taxpayer, and not from a personal injury or threat of injury he suffered.

Clearly, the petitioner's taxpayer status is an insufficient basis to infer injury-in-fact as contemplated by Article III. Therefore, federal jurisdiction does not attach to the petitioner's claims and petitioner is without standing. *See Valley Forge Christian College v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464, 483 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218-19 (1974). The Court of Appeals ruling on this point is correct. (871 F.2d at 1554-56; Petition, Appendix, pp. 58a-68a.)

The other supposed injury petitioner contends allows him standing sufficient to confer federal jurisdiction is that the challenged action "would not only deprive the petitioner of landfill capacity within his own state, but will also divert the time and energy of the Alabama Department of Environmental Management." (Petition, p. 20.) Related to this specific statement of injury, which again for the individual petitioner is based on his taxpayer status and generalized grievance, is the implication by petitioner that he will be injured by the overall effect waste from the Geneva site will have on the environmental quality within the State of Alabama. (Petition, p. 20.) In this way, petitioner seeks to take

advantage of cases construing various citizen-suit provisions in environmental statutes to find a basis for standing in this case. (*See* Petition, p. 21.) However, once again the petitioner's claimed injury-in-fact is not the type contemplated or required for conferring federal jurisdiction over the petitioner's claims. As discussed in Section B below, even assuming petitioner's generalized grievance concerning overall environmental quality amounts to a cognizable injury-in-fact, the constitutional violations petitioner alleges are not the cause of any environmental injury. Therefore, the Court of Appeals correctly ruled the petitioner lacked standing to assert his claims.

B. *Petitioner's Alleged Injuries-In-Fact Were Not Caused by the Alleged Constitutional Violations.*

The petitioner now asserts injury based on the adverse impact shipment of the Geneva waste allegedly will have on the State of Alabama's overall environmental quality and landfill capacity. (Petition, p. 20.) Although the initial pleadings are devoid of any such allegation, the Eleventh Circuit addressed the issue and dismissed the petitioner's claim because the court found no causal connection whatsoever between injury to the State's environment and the lack of notice and opportunity to participate in the selection of the remedial action plan for the Geneva site. (871 F.2d 1554-56; Petition, Appendix, pp. 67a-68a.)

The CWM Emelle facility receives waste daily similar to the waste from the Geneva site, and is fully authorized by law to do so. Petitioner's complaint does not challenge the facility's federal and state permit status, nor its disposal operations. Instead, the petitioner claims that he personally, along with other citizens of the State, was entitled to notice and an opportunity to be heard with regard to EPA's ROD for the Geneva site. Indeed, under the petitioner's theory, the citizenry of every state in which a treatment, storage and disposal facility is located is entitled to notice and hearing for every EPA Superfund remedial action plan.

However, as the Court of Appeals correctly held, the petitioner's supposed injury does not result from the constitutional violations alleged. The petitioner does not directly challenge the shipment of waste from the Geneva site to CWM's Emelle facility. Instead, petitioner alleges constitutional defects in the notice and hearing scheduled by EPA for the Geneva ROD. The petitioner's alleged injuries simply do not result from the challenged conduct. The petitioner has failed to show the required causal connection between the violations alleged and the injury claimed, and that the injury is likely to be redressed by the requested relief. *Allen v. Wright,* 468 U.S. at 751. Therefore, the petitioner lacks standing to raise the constitutional claims.

II. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT LACKED JURISDICTION OVER THE PETITIONER'S STATUTORY CLAIMS.

The Court of Appeals held that Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), does not confer federal court jurisdiction to review challenges to a remedial action until after the action has been taken. (871 F.2d at 1557-59; Petition, Appendix, pp. 72a-87a.) The petitioner challenges the court's reading of the statute by claiming that its action is not a "challenge to the remedial action selected by EPA," but rather an "effort to restore to the petitioners their statutory and constitutional rights to a notice and an opportunity to be heard." (Petition, pp. 29-30.) The petitioner's argument belies the plain language of the statute itself and its legislative history.[5]

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[5]Section 113(h), 42 U.S.C. § 9613(h), states as follows:

(h) Timing of Review.

No Federal court shall have jurisdiction under Federal law other than under Section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under Section 9621 of this title (relating to clean-up standards) to review any challenges to removal or remedial action [sic] selected

Section 113(h), 42 U.S.C. § 9613(h), clearly precludes federal courts from reviewing any challenge to a CERCLA removal or remedial action, unless the challenge falls into one of five enumerated exceptions. In the present case, the petitioner contends his suit falls within the exception contained in Section 113(h)(4), 42 U.S.C. § 9613(h)(4). (Petition, pp. 28-29.)

Judicial review is available under Section 113(h)(4) for citizen suits challenging "removal or remedial action *taken* under Section 104 or *secured* under Section 106." (Emphasis added.) Congress' use of the past tense in this section reflects an unquestionable intent to bar review of *ongoing* cleanup actions. As explained by the House Judiciary Committee, from which this provision originated: "This provision is not intended to allow review of the selection of a response action *prior to completion* of the action: the provision allows for review only of an 'action *taken*' . . . "[6] The Conference Report affirms that Section 113(h)(4) bars review of ongoing response actions:

> [A]n action under Section 310 would lie *following completion* of each distinct and separable phase of the cleanup. For example, a surface cleanup could be challenged as violating the standards or requirements of the Act once all of the activities set forth in the Record of Decision for the surface cleanup phase have been *completed*. . . . Similarly,

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under Section 9604 of this title, or to review any order issued under Section 9606(a) of this title, in any action except one of the following:

. . .

(4) An action under Section 9659 of this title (relating to citizen suits) alleging that the removal or remedial action taken under Section 9604 of this title or secured under Section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

[6]H. R. Rep. No. 253, 99th Cong., 2d Sess. 23, *reprinted in* 1986 U.S. Code Cong. & Ad. News 3038, 3046 (emphasis added). The Report explains that this amendment was adopted to preclude litigation that could delay prompt cleanup of CERCLA sites. *Id.* The instant litigation is precisely the kind of delay of a CERCLA cleanup that was to be precluded by this Amendment.

> . . . a challenge could lie to a *completed* excavation or incineration response in one area. . . .[7]

Petitioner is challenging an ongoing phase of the remedial plan for the Geneva site: the off-site disposal of contaminated soil. Since that phase has not yet been completed, the district court lacked jurisdiction to review claims brought by the plaintiffs below. That plaintiffs couch some of their claims in constitutional terms makes no difference. *See South Macomb Disposal Authority v. EPA*, 681 F. Supp. 1244, 1251 (E.D. Mich. 1988) (Section 113(h) precludes constitutional challenges to CERCLA before completion of cleanup).[8]

The Court of Appeals correctly held that Section 113(h) precludes any review to the selection of a removal or remedial action. Section 113(h) then excepts from this bar, in subsection (4), certain citizen suits "alleging that the removal or remedial action *taken*" violated any requirement of CERCLA. The final sentence, however, states that even a citizen suit making such allegations cannot be brought regarding a removal where a remedial action is going to be accomplished at the site. This provision does not in any way confer jurisdiction over petitioner's claims.

It is important to note that the terms "removal" and "remedial action" are defined terms in CERCLA. 42 U.S.C. § 9601(23) and (24). A "removal" is the immediate action

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[7]H. R. Rep. No. 962, 99th Cong., 2d Sess. 224 (Conference Report), *reprinted in* 1986 U.S. Code Cong. & Ad. News 3276, 3317 (emphasis added). Although the Conference Report is unambiguous, the floor debates contain some contradictory remarks. *See* 132 Cong. Rec. S14898 (daily ed. Oct. 3, 1986) (remarks of Sen. Stafford); 132 Cong. Rec. H9575 (daily ed. Oct. 8, 1986) (remarks of Rep. Florio). However, these remarks were strongly contested by Representative Glickman, who served on the House Judiciary Committee and was responsible for section 113 in the Conference. *See* 132 Cong. Rec. H9582 (daily ed. Oct. 8, 1986). He affirmed that section 113(h)(4) bars *any* suit challenging an ongoing cleanup. *Id.* In face of the unambiguous language of section 113(h)(4), the Conference Report, and the remarks of Rep. Glickman, this Court should give no weight to any contrary views of individual members of Congress.

[8]Respondent is aware of only one case decided under CERCLA since the 1986 Amendments in which a court has held section 113(h) inapplicable. *See Chemical Waste Management, Inc. v. EPA*, 673 F. Supp. 1043, 1054-55 (D. Kan. 1987). In that case, however, the plaintiffs were not challenging selection of a remedy for a particular site and the requested relief would not have delayed any cleanup.

taken when hazardous substances have been released in order to minimize or mitigate damage. It includes such actions as fencing the area, providing alternative water supplies, or, if necessary, evacuation. A "remedial action" means those later actions taken at a site to permanently remedy the situation. Examples of remedial action include onsite incineration or excavation and transportation to an offsite landfill, such as has been done in the instant case. Thus, the last sentence of Section 113(h)(4), 42 U.S.C. § 9613(h)(4), which states that a citizen suit "may not be brought with regard to a *removal* where a *remedial action* is to be undertaken at a site" means that even a completed emergency "removal" (such as an evacuation) cannot be challenged when there is to be a later remedial action (such as excavation of contaminated soil and shipment to an offsite disposal facility). When read properly, it is evident this sentence has no application to the present case, which is a challenge to a "remedial action" not yet completed.

Section 113(h)(4) in no way allows petitioners to escape the general jurisdiction bar of Section 113(h), 42 U.S.C. § 9613(h). Therefore, the Court of Appeals was correct in ruling that the district court lacked jurisdiction to hear the petitioner's statutory claims.

III. NO OTHER OVERRIDING OR COMPELLING REASON EXISTS FOR THE WRIT TO BE GRANTED.

A review on writ of certiorari is not a matter of right, but of judicial discretion, and should be granted only when special and important reasons exist. No such special or overriding reason is present in this case. The decision of the Court of Appeals is not in conflict with the decision of any other federal court of appeals; the case does not involve a federal question decided in an way that conflicts with any state court of last resort; and, the case presents no unsettled constitutional questions that would warrant granting the writ. Therefore, the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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